JOURNAL

OF

COMPARATIVE LEGISLATION

AND

INTERNATIONAL LAW

EDITED FOR

THE SOCIETY OF COMPARATIVE LEGISLATION

BY

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Let observation, with extensive view,
Survey mankind from China to Peru.
SAMUEL JOHNSON.

THIRD SERIES VOL. XXIV PART I

LONDON:
SOCIETY OF COMPARATIVE LEGISLATION,
28 ESSEX STREET, LONDON, W.C.2.
1942.

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All communications to be addressed to the Hon. Editor,
28 *Essex Street, London, W.C.2*
The Annual Subscription to the Society is one guinea. (*Canada and U.S.A.* $5.)

Printed in Great Britain by
Hazell, Watson & Viney, Ltd., London and Aylesbury.

CONTENTS OF VOLUME XXIV.

PARTS I AND II.

(Contents of Part II marked with an asterisk (*).)

PAGE

FOREIGN MARITIME COURTS 1
Contributed by the RT. HON. THE VISCOUNT SIMON, Lord High Chancellor.

DAMAGES FOR LIBEL IN THE UNITED STATES AND ON THE EUROPEAN CONTINENT 6
Contributed by DR. IGNACE ROTHENBERG.

THE EFFECT OF WAR UPON CONTRACTS OF INSURANCE OF PROPERTY . 15
Contributed by ARNOLD D. MCNAIR, ESQ., C.B.E., LL.D., F.B.A.

NULLUM CRIMEN SINE LEGE 29
Contributed by PROFESSOR STEFAN GLASER, of Poland.

THE PRIORITY OF MARITIME LIENS 38
Contributed by GRIFFITH PRICE, ESQ., M.A., LL.D.

GOVERNMENTS AND FILMS 42
Contributed by OLIVER BELL, ESQ., Director of the British Film Institute.

LEGAL AID WORK IN THE UNITED STATES 49
Contributed by JOHN S. BRADWAY, ESQ., Director of the Legal Aid Clinic, Duke University, U.S.A.

MONEY IN THE LAW 51
Contributed by MARTIN DOMKE, ESQ., LL.D.

POLISH LEGISLATION IN EXILE 57
Contributed by DR. MANFRED LACHS.

CODIFY OR CONSOLIDATE? 60
Contributed by J. E. JAMES, ESQ.

NOTES ON IMPERIAL CONSTITUTIONAL LAW 63
Contributed by PROFESSOR A. BERRIEDALE KEITH.

*CONSTITUTION OF THE BRITISH COMMONWEALTH 83
Contributed by SIR ALISON RUSSELL.

*IMPERIAL RELATIONS WITHIN THE KINGDOM OF THE NETHERLANDS . 90
Contributed by W. G. PEEKEMA, ESQ.

*SOME PROBLEMS INVOLVED IN THE RECOGNITION OF AFRICAN LAW . 108
Contributed by JULIUS LEWIN, ESQ.

*ADMINISTRATIVE ADAPTATION IN A CHANGING WORLD 114
Contributed by A. J. WALDEGRAVE, ESQ.

*CZECHOSLOVAKIA: LEGISLATION IN EXILE 120
Contributed by DR. EGON SCHWELB.

*NORWAY: LEGISLATION IN EXILE 125
Contributed by an Official of the Norwegian Ministry of Justice and Police.

*NOTES ON IMPERIAL CONSTITUTIONAL LAW 130
Contributed by PROFESSOR A. BERRIEDALE KEITH.

NOTES:

Corrigenda 68
Testator's Family Maintenance. J. C. G. 68
Cause and Consideration. M. F. P. H. 68
The Privy Council on *Renvoi*. A. Berriedale Keith 69
Labour in Poland 70
International Organization 71
Judicial Efficiency 71
The Schuster Library 71
Comparative Law in Scotland. J. C. G. 72
Legal Pasigraphy. F. M. G. 72
Overseas Subscriptions 72

NOTES (*continued*); PAGE

*Review of Legislation 134
*Back Numbers 134
*Lectures to Foreign Lawyers 134
*Comparative Criminal Law at Cambridge. H. C. G. . . . 135
*Social Security in New Zealand 137
*Legality of Detention under Defence Regulations. A. B. K. . . 137
*Comparison of English and South African Law 137
*Refusal of Minister to Order Production of Documents. A. B. K. . 138
*Refusal to Allow an Alien to Land. A. B. K. 139
*Uniformity of Legislation 139
*Polish Lawyers Association in the United Kingdom 140
*Statute Revision in America. C. T. C. 140
*Legislative Procedure in South Africa. C. T. C. 141

NOTICES OF BOOKS:

Carr, Sir Cecil, *Concerning English Administrative Law*. M. . . 73
Stone, H. A.; Price, Don K.; Stone, Kathryn H.; *City Manager Government in the United States*. V. G. 74
Wilson, Sir Arnold; Mackay, G. S.; *Old Age Pensions*. G. H. Stuart Bunning 75
Advisory Bodies. Edited by R. V. Vernon and Dr. N. Mansergh. C. T. C. 76
The International Labour Code, 1919–1939. C. E. A. B. . . . 78
Government in War Time Europe. Edited by H. Zink and T. Cole. J. M. J. 79
Annual Digest and Reports of Public International Law Cases. 1935–7. Edited by H. Lauterpacht. H. A. Smith 79
Kellor, Frances. *Arbitration in Action*. J. E. James. . . . 80
Lewin, Julius. *A Short Survey of Native Law in South Africa*. C. K. A. 81
*Niemeyer, Gerhart. *Law Without Force*. F. N. Keen . . . 141
*Sullivan, Harold W. *The Law of Trial by Newspaper*. R. O'S. . 142
*Helczynski, Professor. *Underlying Principles of Polish Commercial Law*. (*Polish Science and Learning*.) H. C. Gutteridge . . 143
**Annual Register*. 1941 143

FOREIGN MARITIME COURTS

[*Contributed by* The Right Hon. the Viscount Simon, Lord High Chancellor.]

It has been suggested to me that readers of the *Journal* might be interested in a short account of the institution and authority of the Foreign Maritime Courts which have recently been set up in the United Kingdom, and in which the judiciary of Allied Powers may try and punish certain classes of offences committed against the maritime or merchant shipping laws of that Power. Certainly, the statute of the United Kingdom Parliament which provides for this is of a very unusual character and runs counter to the general principle that a civilized State within its own borders will countenance no courts but its own. But circumstances alter cases. The hard conditions in which some of our Allies find themselves, with their own country invaded and their native institutions for the time being largely overthrown, combined with the resolute courage they are showing in maintaining the struggle by taking refuge in this island and doing their utmost to help to carry on the fight at sea (as well as in the air and on land) are universally regarded as justifying a novel departure.

The Act of 1941. — The Allied Powers (Maritime Courts) Act, 1941 (4 & 5 Geo. VI c. 21) was passed through both Houses of Parliament by general consent in May of last year. It is a temporary Act, and is not intended to continue beyond the time when emergency powers connected with the War are considered necessary. The Act provides that it shall be lawful for any Power allied with His Majesty, or for any Power for the time being at war with our enemies, to which the Act is applied by Order in Council, to be authorized " to establish and maintain in the United Kingdom courts of justice to be called Maritime Courts " having such criminal jurisdiction as is conferred upon them by the Act. The jurisdiction is described in section 2 as being jurisdiction " to try persons not being British subjects " for certain offences committed against the law of the Allied Power, viz. (*a*) any act or omission committed on board a merchant ship of that Power; (*b*) any act or omission committed by the master or any member of the crew of a merchant ship of that Power in contravention of the merchant shipping law of that Power; and (*c*) any act or omission committed in contravention of the mercantile marine conscription law of that Power by any person who is both a national of that Power and a seaman of that Power as defined by the Act, *i.e.* a person who has been employed on board ships of that Power either as master or member of the crew for a period of six months or more. The broad effect is to confer on an Allied court, sitting in this country, jurisdiction which will help to secure discipline in its own merchant ships and to enforce maritime conscription on its seafaring subjects who are found in this country.

Jurisdiction of Foreign Courts. — Our Parliamentary legislation is primarily territorial, and an Act of Parliament normally applies to all persons and things within the United Kingdom. There are cases, however, in which Parliament has provided for the punishment of a British subject for an offence committed in foreign territory—for example, in the case of murder or manslaughter or bigamy. So far Parliament would not be acting otherwise than in accordance with the rules and principles of international law as understood here and in the United States. But it would only be by a disregard of those principles, in our view, that Parliament could legislate so as to deal with foreigners in respect of acts committed in places outside British jurisdiction. Lord Chief Justice Russell explained the rules

governing the interpretation of statutes on this matter in a classical judgment in the *Jameson* case [1896] 2 Q.B. 425 at p. 430. He said:—

> "One very general canon of construction is this—that if any construction otherwise be possible, an Act will not be construed as applying to foreigners in respect of acts done by them outside the dominions of the sovereign power enacting. That is a rule based on international law, by which one sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory."

This passage brings out into clear relief the remarkable and unusual character of the legislation which I am describing. For, under the authority of the Allied Powers (Maritime Courts) Act, Parliament is authorizing the exercise of jurisdiction over foreign seamen in foreign ships, though this jurisdiction can only be exercised if the Allied Power applies to set up its tribunals here. To take a simple instance, suppose that while a Polish merchant ship is on the high seas a murder is committed on board by a person who is not a British subject. Our criminal courts could have no jurisdiction in such a case; yet the new Act authorizes the trial and punishment of the murderer in this country by the Polish Maritime Court on the ground that the ship is Polish. For completeness of statement, I had better add that English courts do exercise jurisdiction in respect of offences committed on board a British ship whether the ship is on the open sea or in foreign territorial waters below bridges, and whether the offender is or is not a British subject or a member of the crew. See *Reg.* v. *Anderson* L.R. 1 C.C.R. 161; *Reg.* v. *Carr* 10 Q.B.D. 76. This is (as Sir Courtenay Ilbert pointed out in a valuable excursus in his *Government of India*, 3rd Ed. at p. 375) on the basis that a British ship may for some purposes be regarded as if it were an outlying piece of British territory. How all this works out may be ascertained by referring to sections 684 to 687 of the Merchant Shipping Act, 1894. Such offences, being committed outside any English county, could not be dealt with here without express legislation; originally they were dealt with in the Court of the Admiral. Now they are usually dealt with at the Old Bailey.

This, however, is by the way. The interesting and important thing is that there are being set up within our own borders, under the authority of an Act of Parliament passed for the purpose, courts which are not the King's courts but are the courts of another Power, staffed by judges who are not British judges and are not appointed by any British authority, and dealing with offences by foreigners which would not be triable in English courts at all. Except for the setting up of foreign military courts, to which I refer below, this is the first time that Parliament has authorized so complete a departure from the established rule.

Enforcement by British Authorities.—There is a further feature in these novel arrangements which is quite unique. The administration of criminal justice does not consist only in the existence of a court with judges to try, and if necessary to sentence, the accused. Something is needed before that can happen; and something else is needed after sentence is pronounced. The accused has to be found and brought before the court and if he is sentenced to imprisonment, he must be imprisoned in a gaol. At both ends of the process it is the British authorities who provide the necessary machinery. By section 5 of the Act, a British Justice of the Peace, on information on oath laid before him by a person authorized by the Allied Power to institute proceedings before the Foreign Maritime Court, may issue a summons requiring the person to be charged to appear before the Maritime Court and, if necessary, a British Justice of the Peace may issue his warrant for the arrest of the person accused. Similarly, by section 6 there is provision for a British Justice of the Peace to compel the attendance of witnesses before the Foreign Maritime Court; and by section 8 a person sentenced by a Maritime Court to detention, or ordered by that Court to be detained, for contempt of court, or pending the determination of proceedings against him, may be detained under the authority of the Home Secretary in a prison in the United Kingdom and a fine

imposed by a Maritime Court may be recoverable here as a civil debt by the Government of the Allied Power concerned.

The Prerogative of the Crown.—All this is certainly very remarkable, for it seems to transgress the established rule which every European State (since the abolition of the Capitulations with Turkey) would insist upon, viz. that the only criminal jurisdiction that a State will tolerate or recognize within its own boundaries is the jurisdiction of its own courts. In the list of ancient prerogatives of the Crown in this country was included the right to set up courts (see Chitty on *The Prerogative,* p. 77) though it seems to me exceedingly doubtful whether that prerogative remains intact in view of the statutory provisions authorizing or confirming the jurisdiction of different kinds of courts all over the country, for the prerogative, as was pointed out in the famous case of *de Keyser's Hotel* [1920] A.C. 508, is only the residue of discretionary authority left in the hands of the Crown after the legislature (to which the Crown itself is a party) has done its work. But no one, I imagine, would suggest that the prerogative of the Crown in this country ever extended to the setting up within our boundaries of the courts of a foreign sovereign. The courts are the King's courts, whereas the Foreign Maritime Courts now being established, though authorized by the British Parliament, are courts of the Norwegian, Dutch, Polish, Belgian, and other Governments. There could hardly be a more striking proof of the omnipotence, in the legal sphere, of Parliament, or of the novelty of the arrangements I am describing.

There is, of course, nothing surprising in foreign law being applied in courts meeting in this island. The law of England which governs the action of English courts may require in particular circumstances that the law to be applied is a foreign law. What the law provides is a question of fact to be proved by experts. The Judicial Committee of the Privy Council is applying law which is not English law in nearly every case it tries. The Court of Session in Edinburgh, when it deals with a dispute with regard to certain lands in Orkney and Shetland, would still determine the matter according to "Udal," and not feudal, land law, for the reason that this part of the soil of the United Kingdom is still held on the principles of Norwegian tenure. That strange consequence is the outcome of a romantic alliance between the Royal Houses of Norway and of Scotland long ago.

A Dutch Precedent.—My noble and learned friend, Lord Macmillan, contributes from his erudition the following account of a remarkable precedent of long ago, which, in some respects, provides a parallel to the recognition which the British Parliament is now conferring on a foreign court within our own boundaries. He writes:—

> "The Government of the Netherlands, in instituting Dutch Courts in this country in which offences by Dutch subjects will be dealt with by Dutch judges according to Dutch law, has not created an entirely new precedent in international law. Indeed, in the case of the Netherlands, the Allied Powers (Maritime Courts) Act, 1941, under which these courts are being established in the United Kingdom, might be said to be a belated act of reciprocity for the privileges which long ago were conferred upon the Scottish nation in the Netherlands.
>
> "The history of Scottish commercial relations with the Low Countries goes back to very early days. The seat of the Scottish Staple was located at different times at Bruges, Antwerp and Middelburgh, but in the sixteenth century we find it firmly established at Veere or Campveere in Zeeland. For the protection of the interests of the Scottish merchants resorting to the Netherlands and for the enforcement of trade regulations, an official was appointed by the Scottish authorities who was designated by the resounding title of 'The Lord Conservator of the Scottish Privileges in the Netherlands.' An Act of the Scottish Parliament of 1503 conferred jurisdiction on the Conservator in all pleas between Scottish merchants in the parts beyond the sea and required him to sit with 'six of the best and honest merchants of most knowledge of the Realm,' or if six could not be found then at least with four. On this statute Sir George Mackenzie observes: 'It is fit to know that the Dukes of Burgundy gave the Scots the first privilege of Staples, which was transferr'd to Camphire at the christening of Prince Henry. The Conservator is by a Right under the Great Seal constituted Judge there betwixt merchants and he must have by this Act six Assessors

or at least four, which is still observ'd and the Decreets run in his name with the consent of his Assessors, and of late by Articles with the Prince of Orange. The Conservator has the sole criminal jurisdiction when crimes are committed by Scots merchants. . . .' (*Observations on the Acts of Parliament*, first published in 1686: *Collected Works*, Vol. 1, p. 235).

" A Grant by Maximilian of Burgundy in 1541 expressly recognised the Conservator's Court at Campvere and provided that ' the difference arising between those of the (Scottish) nation amongst themselves shall be decided by the Conservator of the said nation.' Much more elaborate provisions are contained in Contracts entered into between the magistrates of Campvere and the Royal Burghs of Scotland in 1578 and 1676. The former prescribes that ' as to all causes as well civil as criminal, that fall out among any of the said nation . . . the Conservator shall only have the judgment, without impediment, according to the privileges of the said nation, which the Lord Conservator may (those of the said nation being found guilty) put in prison within the prison house of the town and again release them as he pleases and that none other have to do thereintill.' The Contract of 1676 is even more explicit and also provides for the settlement by arbitration of any civil dispute between a Scotsman and a Dutch inhabitant of Campvere, the Conservator and the magistrates of the town being respectively required each to name three arbitrators who are empowered to choose an umpire in the event of an equal division of voices. There appears to have been a further Staple Contract in 1679, ratified by the respective Sovereigns, re-affirming the civil and criminal jurisdiction of the Conservator ' over the persons and goods of those who belong to the Scots Staple and who reside within the town of Campvere or Freedom thereof.'

" There are two cases relating to the Conservator's Court in the old Scots law reports. In one of them, *Coutts & Co.* v. *Ramsay and Stewart*, in 1749, it was held that the Court of Session had no jurisdiction to review judgments of the Conservator's Court (Morison's *Dictionary*, p. 7341). In the other case, *Hog* v. *Tennent*, in 1760 (Morison's *Dictionary*, p. 4780), the pursuer, who was a member of the Scots factory at Campvere, brought an action in the Court of Session against another member of the factory for payment of an account and for other redress. The defender objected to the jurisdiction on the ground that the Conservator's Court had privative jurisdiction in all cases between Scots residents in Campvere. The Court of Session repelled this plea and sustained its jurisdiction. The report adds that ' the propriety of the decision in the case of *Coutts* as to the Conservator's judgments not being subject to review here was much doubted of.' Lord Kames, who also reports the case, states that the pursuer submitted in argument that the decrees of the Conservator, like those of colonial judges, could only be reviewed by the King in Council. Erskine, who devotes a brief paragraph to the Conservator's Court, doubts the soundness of this argument and seems to have thought that the better opinion was that an appeal lay to the Court of Session. (*Institute of the Law of Scotland*, I, iv, 34.)

" With the abolition of the Staple in 1799, the office of Lord Conservator ceased to have any reason for its further existence and became a mere sinecure, but as such it survived till as late as 1847.

" In 1938, when I was attending a meeting of the International Law Association at Amsterdam, I paid a visit of sentiment to Veere (the name means *ferry*) and saw there the beautiful old Scottische Huis in which the Lord Conservator used to live and I was also shown at Middelburg many interesting archives relating to the Scottish community. It is to be feared that both the ancient house and the records perished in the brutal devastation wrought in Zeeland by the German invaders in 1940. Four of the Communion Cups which were formerly in use in the Scottish Church at Veere found their way in 1893, after various vicissitudes, to Manchester Cathedral. I trust that they have survived the enemy's onslaught on that city.

" (Those who may wish detailed information regarding this episode in the relations between the Netherlands and Scotland will find it in ' The Scottish Staple at Veere,' by Davidson and Gray: Longmans, Green & Co., London, 1909; ' The Scottish Staple in the Netherlands,' by Rooseboom: Nijhoff, The Hague, 1910; and ' The Journal of Thomas Cuningham of Campvere ': Scottish History Society, Third Series, Vol. IX, 1928.) "

This is indeed a striking exception to the general rule, and it is the more to be noted because criminal, as well as civil, causes were dealt with by the Conservator. Another exception of the present time should be mentioned, viz. the arrangement by which the army of an Ally quartered in this country may deal in his own military courts with offences committed by its own soldiers in breach of its own military law. On the true status and source of authority before the Reformation of ecclesiastical courts in this island when dealing with " criminous clerks," much interesting learning may be found in Professor Maitland's *Canon Law in England*.

Law's Contribution to the Battle for Liberty.—Whatever exceptions in the past or in the present may be suggested, there can be no doubt that the passing and application of the Allied Powers (Maritime Courts) Act are events which, in the realm of comparative legislation, are of the highest novelty, importance and significance. And let me end with a wider reflection—for law is not the whole of life, and indeed, our chief masters in legal science, like Pollock and Maitland and others, have always taught that legal principles and rules should be regarded as a framework, by the help of which we may appreciate more clearly human and social and international developments. The legislators of Britain have not found any difficulty in passing this Act, for it is natural that we should offer our soil for the setting up of these foreign courts, because they are the courts of Allies driven by fraud and force from their own territories, and taking refuge here in order to continue with us to the end in the battle for liberty. There would not be much law to respect, here or elsewhere, if the Nazis were to triumph. This Act of Parliament is a contribution to help to keep alive respect for the orderly administration and established decencies of a judicial system, until the day comes when these foreign courts and foreign judges can return to their native land.

DAMAGES FOR LIBEL IN THE UNITED STATES AND ON THE EUROPEAN CONTINENT.

[*Contributed by* Dr. Ignace Rothenberg.]

The law of defamation in the United States seeks to prevent high damages. Juries are unfettered in their discretion to assess damages only in cases of grave insults and provided either that the malicious character of the defamation cannot be doubted, or that the newspaper refuses to retract.

The following examples of excessive damages are mentioned: The award of $25,000 to a married woman who was charged in a highly sensational manner with entertaining adulterous relations, although the story was completely untrue ; or of $20,000 for the groundless charge of arson with the alleged purpose of obtaining insurance money. But even in such cases the higher courts usually reduce the amounts awarded if, in their opinion, the juries have gone too far. A New York magistrate was awarded $40,000 by a jury as a result of a statement by a New York newspaper, which had charged him in a series of articles with flagrant misconduct in the discharge of his official duties. But the higher court found the damages excessive and reduced them to $25,000. In another case, where a person, who had been charged with conspiracy to defraud an insurance company, asked for $36,000, the court awarded $20,000.[1]

There are various regulations in the United States which aim at stopping speculative libel actions. Some of them meet the principal demands of the British newspaper world. Of special importance are the regulations, according to which in many kinds of libel cases, mentioned by the law, only actual damages suffered by the offended person may be awarded. Usually these regulations run as follows:—

" If it shall appear upon trial that an article was published in good faith, that its falsity was due to mistake and misapprehension, and that a full correction or retraction was published, the plaintiff may recover actual damages only."[2]

Sometimes the wording makes particular concessions to the necessities of editorial work by using terms such as " if the falsity of the statement was due to misinformation " (Iowa), or " by inadvertence " (Maine), or " under a mistake as to facts " (Minnesota), or " due to honest mistake and that there were reasonable grounds for believing that the statements were true " (Ohio, North Carolina).

The principle that in certain libel cases only actual damage should be awarded, is also expressed in the following way: " The defendant may give proof of intention " (to retract the defamation) ; " and unless the plaintiff shall prove either malice in fact or that the defendant, after having been requested by him in writing, to retract the libellous charge . . . failed to do so within a reasonable time, he shall recover nothing but such actual damages as he may have specially alleged and proved."[3]

Another way to stem the flood of libel actions is provided by regulations which order offended persons to inform the publishers of newspapers in which

[1] W. R. Arthur and R. L. Crosman, *The Law of Newspapers*, 2nd ed., New York, 1940, at p. 67.

[2] Alabama (7362), Indiana (Sec. 2—1043), Iowa (Sec. 12413), Maine (Ch. 96, Sec. 48), Massachusetts (Ch. 231, Sec. 93), Michigan (Sec. 14471), Minnesota (9397), New Jersey (Sec. 226), and other Statutes.

[3] Connecticut (5668), New Jersey (Sec. 226).

the defamation is published of their intention to bring an action, unless the insulting statements are retracted and corrected. The psychological value of such a step is obvious ; personal contact usually brings adversaries nearer to each other and facilitates the settlement of disputes. The law assumes that both parties are inclined to do so, even those offended persons, who otherwise would be anxious to obtain the highest possible damages, but who must now attempt a reconciliation, if they wish to qualify for any reparation.

The regulations in question are practically identical. The offended party shall, three or five days before filing the complaint in the intended suit, serve notice in writing on the publisher, specifying the statements which he alleges to be false and defamatory. If reasonable grounds for the article in question can be given, and a " full and a fair retraction of any statement therein alleged to be erroneous is published . . . within three (five) days "—or within ten days if it be a weekly publication—" then the plaintiff shall recover only actual damages."[4]

As a rule, the retraction should be published " in a conspicuous place and type, in the same place where said original item appeared." In this way, libel actions aiming at excessive damages are frustrated. The fact that such statutes have been introduced recently, *e.g.* in Georgia in 1939, in an increasing number of States of the American Union, testifies to the satisfactory experience with such regulations.

Other Legal Provisions Concerning Claims for Damages.—Consideration of the special difficulties of editorial work lies at the root of some other provisions in American statutes. In order to mitigate damages, the defendant in Iowa (sec. 11172) may set forth in a distinct division of his answer any facts, of which evidence is legally admissible ; in New Hampshire he may prove (chap. 335, sec. 6) " that the writings complained of were the repetition of common report," and in Virginia (sec. 6240A) he may adduce in evidence " all the circumstances of the publication, including the source of the information in character as affording reasonable ground of reliance, any prior publication elsewhere of similar purport, the lack of negligence or malice." The defence that the statement complained of originated from a source which could be regarded as reliable, is allowed. This relieves the paper of the charge that it has not made inquiries regarding the truth of the statement concerned.

Even in cases where the statute does not compel the offended person to request the paper for a correction, the fact that he had taken the first step towards suggesting a retraction will be taken into account in the judgment. A plaintiff who, by his conduct, creates the impression that he is hunting for damages does not meet with the sympathy of the court. In addition, the fact that the defendant newspaper corrects or retracts the defamatory statement without being requested, or at least offers a publication of retraction to the plaintiff, will also be interpreted in his favour.

A regulation which may be found frequently says: " The defendant . . . may prove . . . in mitigation of damages that he has retracted the charge and offered amends before suit by publishing an apology. . . ."[5]

Among other statutes which deal with the advantages accruing to defendants in libel actions, the following regulations may be noted: " If the defendant, before the answer is required to be filed therein, gives written notice to the plaintiff or to his attorney of his intention to publish a retraction of the libel, accompanied by a copy of the retraction, which he intends to publish, he may prove such publication in mitigation of damages. If, upon such notice, the plaintiff does not accept the offer of retraction, the defendant may prove in mitigation of damages his offer to publish such retraction . . . ; and unless the

[4] Such regulations are contained, *e.g.* in the Statutes of Alabama (7362), Georgia (Sec. 2 of 1939), North Carolina (42429a), North Dakota (4352a), South Dakota (Sec. 96).

[5] Alabama (7360), and other Statutes.

plaintiff proves actual malice or want of good faith . . . he shall recover damages only for the actual injury sustained."[6]

The relevant provisions, contained in the statutes of Wisconsin, are very mindful of the interests of newspapers. It is said there: " Any true statement, explanation, correction, or retraction, published without comment . . . within a reasonable time, may be introduced upon the trial of any such action as a sufficient defence against any imputation of malice and against the recovery of any damages except actual damages."[7]

The undesirability of actions brought by persons of doubtful reputation who only aim at damages, as their reputation cannot be repaired at all, is also dealt with in some statutes. In Massachusetts (chap. 231, sec. 93) the defendant is allowed to set forth " acts of the plaintiff which create a reasonable suspicion that the matters charged against him by the defendant, are true." Also in New Hampshire (chap. 335, sec. 6) " the conduct of the plaintiff " must be considered, if there is reason for believing that the charges against him are founded. An English newspaper would run heavy risks if it followed such principles.

Many statutes in the United States refrain from providing detailed regulations and content themselves with the following provision: The defendant may allege " any mitigating circumstances to reduce the amount of damages,"[8] and it is for the learned judge to direct the jury accordingly.

A friendly attitude towards newspapers is also maintained by the statute of Delaware (4693): In libel actions where the truth is pleaded and given in evidence, if it " be found that the libel was written or published properly for public information and with no malicious or mischievous motives, the jury may find for the defendant." This wording gives the defendant many opportunities of claiming that the publication was made in the public interest and that the population is entitled to be properly informed. This regard for the needs of editorial work reaches its climax in Massachusetts, where " in no action of libel shall exemplary or punitive damages be allowed " (chap. 231, sec. 93).

According to these regulations, damages similar to those awarded in *Jones* v. *Hulton* and *Cassidy* v. *Daily Mirror,* etc., would never have been given in many States of the American union. The plaintiffs would not have succeeded, as the defendants were either mistaken or had acted " by inadvertence," or because " there were reasonable grounds for believing that the statements were true." Besides, a defendant in these States could claim that he had acted " in good faith " and a " full retraction or apology was published." In these circumstances no actual damages would be considered to have occurred and the action would have been dismissed with costs.

On the whole, juries in the United States are entitled to award punitive damages, if at all, only in cases where malice or gross negligence appears. Even then regulations often avoid the expression " punitive " or " vindictive " damages, and provide that " . . . such damages may be awarded as the jury shall deem proper."[9]

What are actual damages? They include, according to the statutes of Indiana (sec. 2–1044), " all damages that the plaintiff may have suffered in respect to his character, property, business, trade, profession, or occupation, and no other damages whatsoever." In Michigan (sec. 14472), besides actual damages, also " damages to feelings " are admissible, and the jury shall in all cases specify the amount for this purpose separately from the amount awarded for other damages. Specification of damages takes place also in other States

[6] Massachusetts (Ch. 231, Sec. 93), and other Statutes.

[7] Wisconsin (Sec. 331, 05).

[8] Idaho, Mississippi, Missouri, Nebraska, New Mexico, Oregon, South Carolina, South Dakota, Washington, Wyoming.

[9] Pennsylvania (12–1583).

of the United States, as in the interesting case which occurred in Alaska, where the jury awarded $1 for general damages and $800 for punitive damages.[10]

Vexatious Regulations.—But there are some exceptions to the benevolent attitude towards newspapers, generally shown by American statutes. According to some of them, retraction of the defamation in the aforementioned manner will not suffice in several States to avert excessive damages. There are particular provisions, the character and purpose of which may be called vexatious. In Kentucky (24386b–1) " a sufficient correction, retraction, explanation, or rectification " has to be published " in at least two successive issues . . accompanied by editorials in which the alleged slander is specifically repudiated." Still farther go the statutes of Utah (62–2–1), demanding that a retraction of the libel should be published " at the head of the second column on the editorial page . . . for three days," and a reference to such retraction should be " made also on the local page." If the libel was published in the Sunday edition—the daily papers in the United States have also a Sunday issue which has, as a rule, a bigger circulation—one of the three retractions must appear on Sunday. In case the libel should be directed against any candidate for a public offence or alike, the retraction has to be made editorially. In order to attract attention, the statement of the paper, according to the law of Minnesota (9397), must be headed " Retraction " in at least " 18 point type."

Measures Against Unfounded Actions.—Various regulations which aim at rendering more difficult unfounded actions and the protraction of proceedings do not allow the award of costs to the plaintiff in such actions. According to the statutes of Mississippi (671), the plaintiff shall not be awarded costs in libel actions if he recovers damages of less than $10: " In . . . actions sounding in damages where the plaintiff sues for more than $10 and recovers less than that sum, no more costs than the amount of damages recovered shall be awarded to him, unless the court be of the opinion that the plaintiff had reasonable cause to expect to recover more and that the action was brought for no other purpose than to be compensated for the wrong done."

A similar regulation exists in New Jersey (sec. 239): If the plaintiff recovers damages of less than $50, he shall not be awarded a higher amount of costs. A drastic measure against unfounded actions is provided by the statute of Oklahoma (12–1446): " . . . if there be a verdict in favour of the defendant, and the jury find that the action was malicious or without reasonable provocation, judgment shall be rendered against the plaintiff and in favour of the defendant for his costs, including an attorney's fee of $100." The same tendency is expressed by regulations which aim at preventing the plaintiff from putting the claim for damages too much into the foreground in his negotiations with the accused person. If in Alabama (7363) the defendant " after or before suit brought, make the recantation and amends . . . and also tender to the plaintiff a compensation in money, and bring the same into court, the plaintiff can recover no costs, if the jury believe and find the tender was sufficient."

In Massachusetts (chap. 231, sec. 94) the defendant may allege and prove in mitigation of damages that the plaintiff " has already recovered damages or has received or agreed to receive compensation," if he, despite of it, brought an action for the same libel.

If the plaintiff is a candidate for office at the time of the libellous publication, higher damages are usually awarded, and also the regulations about retraction and apology are more rigorous than in libels regarding private persons. In Iowa (sec. 12415) the retraction must be published " in a conspicuous place on the editorial page . . . within two weeks next before the election." Other statutes contain similar regulations.

[10] W. R. Arthur and R. L. Crosman, *The Law of Newspapers*, 2nd ed., New York, 1940, at p. 67.

The comparatively mild practice in the United States is due to the efforts of the legislative bodies to secure the right of criticism, and not to prevent newspapers from expressing their opinion about public affairs. This principle is laid down in the Constitutions of most States of the American Union, which contain the regulation that " the accused party shall be acquitted, if it shall appear that the alleged libellous matter was published for justifiable ends." If only the " end " has to be justified, some outspoken, even sharp, words may be tolerated.

Restrictions on Damages on the European Continent.—The tradition of chivalry to the effect that a personal insult must be avenged with blood, survived on the continent longer than in Anglo-Saxon countries. In the second half of the last century that tradition penetrated deeply even into the middle classes. The duel was popularized by compulsory military service in Central, Western and Southern Europe. It was a matter of course that officers of the army should settle their private disputes by means of arms ; whoever withdrew from that duty was regarded as a coward and reduced to the ranks. Only if the offender was, according to the severe rules of the code for officers, incapable—owing to his social position—of giving satisfaction with arms, a duel was not admissible. However, even then officers did not always bring an action, but often procured the necessary satisfaction by attacking the offender corporally. It occurred not infrequently that officers who felt offended drew their swords and dealt with the offender on the spot, as they were entitled to do.

This form of settling private affairs was not restricted to officers on the active list. Every year thousands of officer cadets joined the army who were entitled to a shortened period of service and could become officers. After their return to civil life they remained officers on the reserve and were called up from time to time for military exercises which lasted some weeks. Many of them were proud of that status and felt enhanced in their social position ; even in plain clothes they held themselves to be bound by the officer's code of honour, which ordered a duel in case of insult. Although civilians were prohibited from doing so, the courts appreciated the equivocal position of an officer of the reserve who had adopted the military attitude regarding honour, and passed mild judgment ; most judges were former officers. Sometimes the ruler of the country concerned used his right and issued a decree of *nolle prosequi*.

The custom of challenging the offender to a duel became, thus, a prerogative, favoured by high circles, and was regarded as a proof of personal courage. Add to this that in the countries of Central Europe the associations of students cultivated the duel and required their members to settle their affairs with the sword.

These circumstances may explain why the idea of compensating an insult by money could not take root in countries where the conception prevails that, if the circumstances so require, life must be staked in the fight for honour. The offender was regarded as a criminal, and his act as a criminal offence. Accordingly, there could be but one reparation for an insult: the punishment of the perpetrator. If the offence was committed by the Press, the punishment had to be measured according to the extent to which the defamation had been disseminated.

In such a world of an artificially exaggerated sense of honour Private Law did not seem to be a sufficient means for combating defamations. Even the highest amount of money could not wipe out an insult which, according to social views, required a fight with lethal weapons. Moreover, offended persons would not have welcomed the idea that an offence against their honour should be assessed by a court. In the opinion of these circles, a new insult would thus be added to the defamation already suffered, if their moral values were to be assessed in money. Moreover, however high the assessment might be, it would be too low in the eyes of the offended persons and could only cause ironical remarks by the outside world. In fact, one meets in those countries of the

Continent, where, besides criminal proceedings, damages for defamation can be applied for, a deep aversion against such damages, and it occurs frequently that offended persons content themselves with the punishment of the accused, but do not ask for any damages. " My honour is priceless," this is the meaning of such a gesture. In France damages amounting to one franc only, the so-called " franc symbolique," are often demanded. " Ce franc symbolique a seulement pour objet de justifier la réalité de l'offense, de servir de raison d'être à la condemnation, et de marquer ainsi que réparation morale était accordée à l'offense."[11]

The same reluctance to accept money from the offending person can be found in settlements made before or out of court. As a rule, the plaintiff is satisfied with an apology ; sometimes he demands a fine, not exceeding a moderate limit, for a charitable purpose. As regards costs, the plaintiff not infrequently waives his claims to them if he is in good circumstances. In his opinion, however, honour should not be the object of gain or of any pecuniary transaction.

There are still other reasons which, on the Continent, render the hunt for damages inexpedient. The offended person who applies to a civil court creates the impression that he does not consider his grievance important enough to submit the case to the criminal court. Proceedings before the civil court usually meet with little public interest ; the newspapers do not publish reports about them and, consequently, an award of damages would not come to public knowledge. Besides, civil courts work slowly. Injured people who are anxious to obtain the quickest possible satisfaction, reach their aim more speedily if they bring their suit in the criminal court. This procedure is also advantageous for the reason that it is cheap and gives the opportunity in some countries of connecting damages with the punishment of the offending person.

But there are, indeed, defamations which cannot form the object of a prosecution in a criminal court, but which, nevertheless, cause injury to the plaintiff. In such cases compensation must be recovered in the civil court. In most countries this claim is based upon the old-established rule, already laid down in ancient Roman law, that every act, causing damage to anyone, obliges the person by whose fault it has been done, to reparation. But this right is rarely exercised for the reasons mentioned above.

The advantage of prosecuting libels before criminal courts disappear, if juries have to judge in matters of defamation by the Press, a procedure which was still prevalent in many European countries until some years ago. Apart from the fact that high costs arise in proceedings where juries are summoned, such proceedings and their result depend upon so many factors which cannot be foreseen that it is almost hazardous for the offended person to start such an action. There were, in Central Europe, newspapers which looked for such occasions, even provoked them, because they gave them welcome material to get popularity at the expense of the plaintiff. As a trial before a jury affords the opportunity of thoroughly elucidating the case and of scrutinizing the life of the offended person, of unpleasant questions and evidence—that type of newspaper did everything which could cast suspicion on the plaintiff so that offended persons did not begin such suits, but used their right of reply instead.

Finally, the peculiar manner of selecting impecunious persons as responsible editors in European countries prevents the award of excessive damages in libel actions. Not the leading men of the newspaper are responsible for its content, but mostly employees who, in many cases, are merely men of straw. In France it is the gérant, in Central Europe the responsible editor. As the author of a defamation is rarely known, the man of straw is made responsible. But he is, as a rule, innocent of the defamation ; he did not write nor cause it, and he is,

[11] Marc Ancel, *La Diffamation et la Réforme du Régime de la Presse*, in Cahiers de la Presse, 1938, at p. 353.

therefore, according to many Press laws, not accused of having committed a defamation, but of not having prevented its publication. The subordinate position of the responsible editor is taken into account in the comparatively mild sentences. Thus the risk incurred by the newspaper is not heavy, even if owner and editor are liable for the payment of fines and damages, to which the responsible person is sentenced.

The effect of these conditions on the Continent and in the Anglo-Saxon countries respectively becomes quite clear. On the Continent, people criticized by newspapers mostly use their right of reply in order to correct mistakes, and are glad to settle the matter in this way. Elsewhere the prospect of gaining high damages induces many people to look for mistakes in papers, or even for hints, which might possibly be interpreted as referring to them, for the sole purpose of suing and of being awarded a considerable sum of money.

Damages as a Punishment.—Special regulations regarding damages in libel actions are in force in several countries of Europe and other continents. The continuous interest in this problem is shown by the fact that some of these laws were passed in recent years. To begin with France, the classic country of Press laws, from which the most valuable suggestions have come and have influenced the legislation of other countries: the Code Civil, in its articles 1142 and 1149, provides that money compensation, corresponding to the damage sustained, should be paid to the offended person as a reparation. But in the course of time, chiefly under the influence of political conditions, other regulations were introduced which pushed the claim to damages into the background. Among them are to be mentioned the confiscation and destruction of the publication at the request of the offended party ; further, the right of any person mentioned in a newspaper or in a periodical, either by name or indirectly, to reply to that statement,[12] and finally the right of persons, offended by newspapers or periodicals, to publish the judgment against the offender in the publication concerned or in other papers, at the cost of the offending party.

Damages in France, awarded according to the above-mentioned regulations of the Civil Code, are very moderate compared with the amount which is usual in the Anglo-Saxon countries. The highest damages which were ever awarded in France amounted to 50,000 francs, *i.e.* £260 according to the pre-war rate of exchange. All the same, that sum created a sensation and was considered an exception, an " un monument de générosité."[13]

In Austria damages in libel actions have the character of a fine. The responsible editor of the newspaper or periodical, who attempts to justify himself in court in an unfair manner, can be sentenced to pay a fine, according to sec. 30 of the Austrian Press law, in the wording of art. 3 of the Criminal Amendment Act of 1929. If the author of a defamation is unknown, the person responsible for the content of the newspaper is prosecuted. However, he cannot be punished for a defamation which he did not commit, but for " neglect of duty " (Vernachlässigung pflichtgemäber Sorgfalt) only. That is but a small infringement if the case is a defamation. A fine of up to 2,500 Austrian shillings (about £100) may be imposed. Therefore the risk incurred by the responisble editor is not heavy. It sometimes happened that the responsible editor, without being able to do so, declared his readiness to prove the truth of his statements, for the sole purpose of protracting the proceedings and of creating the impression by communicating these facts in his paper that the defamation was well founded. The accused editor did not take any risk, for, if he did not succeed in proving the truth, he could only be sentenced for the above-mentioned " neglect of duty." Meanwhile, he

[12] Cp. an article by the present writer in *The Journal of Comparative Legislation and International Law*, 3rd Ser., Vol. xxiii, 1941, at pp. 38–59, The Right of Reply to Libels in the Press.

[13] Albert Gilles, *La Presse devant le Jury*, Paris, 1938, at p. 196.

had been able to cause the plaintiff considerable annoyance. The above-mentioned regulations are destined to prevent such action, and, in fact, they achieved this aim.

According to sec. 30 (6) of the above-mentioned Press law, the responsible editor, who asserts the truth of his statements, but does not succeed in proving it, can be sentenced, at the demand of the offended person, not only for "neglect of duty," but also to a fine payable to the plaintiff up to the amount of 10,000 Austrian shillings (about £400). The groundless offer to prove the truth of his statement should cost the editor dear. The law also provides for the possibility of the editor not being solvent, and makes the editor and the owner of the paper liable for payment of that amount. This fact deters the responsible editor from a groundless offer to prove the truth of his statement.

German law also knows a fine, payable to the offended person. It can be inflicted, at his demand, besides punishment, only in case of evil report or calumny and provided that the consequences of the defamation affect the economic conditions of the offended person.[14] The amount of the fine is limited to 10,000 Mark (about £800, according to the pre-war rate of exchange).

A solution which lies somewhat between that of imposing a fine or of awarding damages is provided in the Czechoslovakian Press law (of 1924, No. 124, art. 17 (*a*), (*b*), (*c*)). In assessing the indemnity, "the court must consider how much the good name of the offended person has suffered ; a higher amount will be fixed, if the accused has made obviously futile attempts to prove that his statements were true, thus aggravating the offence. A smaller amount must be assessed, or the payment of an indemnity refused altogether, if the accused person has offered to give the prosecutor sufficient satisfaction, which has been refused ; or if it appears, that the prosecutor is endeavouring to make a profit out of the action, which is not in proportion to the damage he has suffered."

These regulations display a certain tendency of friendliness towards the Press. This attitude is proved by the fact that the highest amount of indemnity which the accused may have to pay to the person whose honour has been impugned was fixed at 10,000 Cz. crowns, corresponding to a sum of about £70 only. The courts usually award lower indemnities. "If during the endeavours to settle the matter," so article 18 (*a*) of the above-mentioned Czechoslovakian law says, "with the sanction of the court, the accused person has offered in vain to give the offended party such satisfaction as the court, considering all circumstances, deems to be adequate ; for instance, publication of a correction, withdrawal of the offending passage, and an expression of regret, then the court, in finding the accused guilty, may abstain from passing sentence. In this case, however, the court must order the accused and the publisher to publish the findings of the court." But the clemency of the court is forfeited if the offending passage contains particulars concerning the private life of the plaintiff.

In Greece, too, proceedings involve partly the imposition of a fine and partly the award of damages. According to the law (of January 6, 1919, art. 1), "any person injured by a punishable act beyond the loss which he has suffered from the offence, is entitled to demand also financial satisfaction for his injured honour, and moral distress . . ., the satisfaction being obligatorily imposed by the court in case of condemnation. The demand for financial satisfaction is definitely adjudged by the court trying the case, and in the same decision, the court not being allowed to transfer it to the civil courts. If the decision is an acquittal, all right to such financial satisfaction is excluded." Thus damages are inseparable from the sentence.

In addition to the penalty, imposed according to the terms of the Criminal Law, a joint liability of the publisher of a newspaper and of the author of an injurious publication, relating to private life, is provided by the Greek Constitution

[14] *Straf-Gesetz-B.*, Sections 186 and 187.

(of 1911, art. 14). Both publisher and author are jointly liable " fully to redress any loss occasioned and to indemnify the injured party by payment of a sum of money, determined at the discretion of the judge, but never less than 200 drachmas."

A joint liability for payment of compensation to a third person, comprising author, editor, and owner of the newspaper, and of the printer, but only in a subsidiary capacity, is also provided in the " Books, Documents and Newspapers Law of Siam" (B.E. 2465, 1922–3, art. 20 of chap. III).

The award of damages and a fine is provided for in the Polish Press Laws of 1928 and 1938. The fine, having the character of damages on compassionate grounds, is limited to Zloty 10,000 (about £600), according to article 37 of the law of 1938, after having been fixed at Zloty 3,000 ten years before. While its award lies in the competence of the criminal courts, the offended party may claim " supplementary " damages before the civil courts.

Damages as Compensation.—In contrast, damages as compensation payable to offended persons in Hungary, Portugal, Turkey, and Yugoslavia are entirely for loss of reputation.

According to the Hungarian Press Law (of 1914, art. 39) the injured party " has the right to claim, over and above compensation for the damage caused to his property by the Press communication, corresponding reparation in cash for injury not affecting his property, but occasioned to him by the aforesaid communication. But such reparation may only be claimed when, after the circumstances have been taken into consideration, such reparation should be deemed equitable. The Court of Justice fixes the amount due for damages not affecting property, after having taken into consideration all circumstances, and especially the financial position of the respective interested parties. The injured party has also the right to claim compensation, even should the Press communication not constitute an offence against the law. In this case, however, compensation can be claimed only by an appeal to civil law."

The last-mentioned provision was taken up again in a Bill introduced by the Government in 1929, which so far has not come into force. These regulations, which are in effect similar to the British practice, allow the plaintiff to claim damages for material or moral losses sustained by the defamation. A penalty may not be imposed, unless the plaintiff demands it. In the Hungarian law the amount of damages is not limited ; in practice they are, as a rule, not high.

In Yugoslavia, according to article 30 of the Press Law of 1904, the punishment for libels, directed against private persons, is imprisonment from one month to one year and payment of damages of at least 500 dinars, if the plaintiff so desires and if the court agrees thereto. It is remarkable that, as in Great Britain, the plaintiff need not prove that he has actually suffered damage.

While in Austria a fine is imposed, if the accused newspaper does not succeed in proving the truth of the offending statements, in Portugal damages are provided if the defendant is unable or unwilling to substantiate his allegations. (Law of 1910, chap. II, art. 18.) Both regulations aim in the end at punishing defamations by means of untrue statements—in Portugal punishment in such cases of defamation amounts to from three months up to two years of correctional prison—and, in addition, aims at making the libels expensive by allowing compensation.

A similar regulation exists in Turkey (article 12, chapter II of the law of 1909, July 16). In cases of libel by newspapers, the court simultaneously condemns to damages, according to the moral or material loss the plaintiff has suffered, and to imprisonment or fine, provided by criminal law.

THE EFFECT OF WAR UPON CONTRACTS OF INSURANCE OF PROPERTY.[1]

[*Contributed by* ARNOLD D. MCNAIR, ESQ., C.B.E., LL.D., F.B.A.]

A. PRE-WAR MARINE INSURANCES WHERE ONE PARTY BECOMES AN ENEMY IN THE TERRITORIAL SENSE.[2]

(i) *Historical.*—Before and during the Napoleonic Wars, that is, before the law relating to trading with the enemy had hardened and the effect of war upon contracts crystallized out into certain principles, there existed in regard to contracts of insurance what appears to us to-day, being wise after the event, a certain confusion of thought. It may help us to understand the present law if we try to clear up this confusion.

The period before 1802-1803.—This period is under the influence of standards of opinion on the subject of trading with the enemy which to-day would be regarded as deplorably lax. Lord Mansfield was one of the foremost exponents of the essentially mercantilist point of view. "If we don't trade with them, neutrals will. Why should not our merchants get the benefit?" Fifoot[3] quotes a speech made by Lord Mansfield as Solicitor-General in 1747, when opposing a Bill to "prevent the insurance of French ships and their loading during the war with France." He warned the House of Commons that the effect of the Bill would be "to transfer to the French a branch of trade which we now enjoy without a rival. . . . Not only the nations we are in amity with, but even our enemies, the French and Spaniards, transact most of their business here at London." The French writer Valin pointed out[4] that the effect of allowing British underwriters to insure enemies against capture by British forces was that "one part of that nation [the British] restored to us [the French] by the effect of insurance what the other took from us by the rights of war."

Lord Mansfield as a judge appears to have retained the view which he advocated as Sir William Murray and strongly discouraged the raising of the defence that such insurances were illegal,[5] and it was not until the judgment of

[1] This article is a chapter in the forthcoming second edition of the author's *Legal Effects of War* (1920, Cambridge University Press).

[2] Who is referred to in this article simply as an "enemy." I am defining the expression "enemy in the territorial sense" elsewhere (*Law Quarterly Review*, April, 1942). Suffice it for the present to say that it denotes a person voluntarily resident or carrying on business in enemy territory (*Porter* v. *Feudenberg* [1915] 1 K.B. 857 (C.A.)), or, subject to the decision of the Court of Appeal in *Re an Arbitration between N. V. Gebr. Van Udens Scheepvart en Agentur Maatschappij and Sovfracht* [1941] 3 All. E.R. 419 as to friendly enemies, in enemy-occupied territory.

[3] *Lord Mansfield* (1936), p. 83, quoting from Holliday's *Life of Lord Mansfield*, pp. 90–7.

[4] Tit. vi, *Des Assurances*, art. 3, p. 215, cited by Arnould, *Marine Insurance* s. 85.

[5] See Lord Alvanley CJ. in *Furtado* v. *Rogers* (1802)3 Bos. & P. 191, 197, 199, and the remarks of Buller J. in *Bell* v. *Gilson* (1798) 1 Bos. & P. 345, 354, upon Lord Mansfield's attitude, and of Lord Ellenborough CJ. in *Kellner* v. *Le Mesurier* (1803) 4 East 396, 403. A kind of gentleman's agreement appears to have existed in the insurance market that the fatal defence should not be raised, and no doubt the great weight of Lord Mansfield's opinion survived him and helped to silence any qualms of conscience to which a consideration of the national interests might give rise. It is a little like the understanding that underwriters will not plead the defence that the policy is a P.P.I. policy and therefore unenforceable except in a case where they have a very well-founded suspicion that the plaintiff is a "wrong 'un."

the Court of Common Pleas in *Furtado* v. *Rogers*[6] was delivered by Lord Alvanley in 1802 that it was established that a pre-war policy of insurance, whereby a British insurer undertook to indemnify a foreign shipowner against the loss of his ship by British capture, was abrogated upon the outbreak of a war which made the shipowner an enemy. This judgment was followed and adopted in the year 1803 by Lord Ellenborough C.J. in delivering the judgments of the Court of King's Bench in *Kellner* v. *Le Mesurier*[7] (enemy shipowner—insurance effected during the war) and *Gamba* v. *Le Mesurier*[8] (enemy shipowner—pre-war insurance). In 1803 this rule was in effect extended, in *Brandon* v. *Curling*,[9] to insurance against capture by a co-belligerent with Great Britain, though, that circumstance not being stated in the case submitted to the King's Bench, it was apparently not considered to be open to the Court to rest their judgment specifically upon capture by a co-belligerent and it is based on more general grounds. Meanwhile substantially the same result had been reached by means of the operation of the plea of alien enemy in *Brandon* v. *Nesbitt*[10] in 1794. There an insurance upon cargo was effected before the outbreak of war by a British agent on behalf of French owners who became enemies upon the outbreak of war. The ship (American) and cargo were captured as prize (apparently by Great Britain). When the British agent sued the underwriters, his action was defeated, upon the ground, not that an insurance against British capture was illegal, but that " an action will not lie either by or in favour of an alien enemy." In *Flindt* v. *Waters*[11] Lord Ellenborough C.J. approved this decision and said, " the point there decided was that the fact of the parties interested in the insurance having become alien enemies before the loss happened might be pleaded to an action brought in the name of the British agent who effected the insurance." In *Flindt* v. *Waters* " the insurance, the loss and cause of action had arisen before the assured had become alien enemies ; when therefore they became such, it was only a temporary suspence (*sic*) of their own right of suit in the Courts here, as alien enemies ; but that objection cannot be carried further, nor applied to the plaintiff as their trustee, who is a subject of the King: otherwise, if it could avail upon this plea, it would be making a perpetual which in its nature is only a temporary bar." The remarks of Rowlatt J. in *Schmitz* v. *Van Der Veen & Co.*[12] require notice ; he points out the necessity of distinguishing two cases, the first, " that where the cause of action is unexceptionable, but the plaintiff as an alien enemy is temporarily and personally incapable of being received as a plaintiff " [action to recover pre-war loss], and the second " that where the cause of action, whoever puts it forward, fails in itself, and fails finally."

The period since 1802-1803.—The second stage is reached when it is realized and enunciated, as it was *obiter* in 1803 in *Brandon* v. *Curling*,[13] that, quite apart from capture by Great Britain and her allies, every insurance of enemy property is contrary to the public interest and a loss occurring during the war cannot be recovered. There Lord Ellenborough C.J. said:—

" Where the insurance is upon goods generally, a proviso to this effect shall in all cases be considered as engrafted therein, viz.: ' Provided that this insurance shall not extend to cover any loss happening during the existence of hostilities between the respective countries of the assured and assurer.' Because during the existence of such hostilities the subjects of the one country cannot allowably lend their assistance to protect by insurance the property and commerce of the subjects of the other."

Thus the earlier distinction (if indeed it ever had a sound legal basis) between the insurance of enemy property against British (and allied) capture on the one

[6] *Supra.* [7] 4 East 396. [8] *Ibid.* 407. [9] *Ibid.* 410. [10] 6 T.R. 23.
[11] (1812) 15 East 260, 265. [12] (1915) 84 L.J. K.B. 861.
[13] *Supra.* (Pre-war policy—French cargo—capture by Spain.)

hand and its insurance generally on the other, disappeared, and all pre-war insurances of enemy property by persons in this country were dissolved as from the outbreak of war. Accordingly, in *Ingle* v. *Mannheim Insurance Co.*[14] where there was a loss during the war upon a pre-war policy of marine insurance, the defendant company argued that "a contract cannot be carried out if it involves intercourse with the enemy," and (unsuccessfully) that its London branch office which issued the policy was an enemy, whereas the plaintiffs contended with success that it was not. Conversely, in *Theodor Schneider & Co.* v. *Burgett and Newsam*[15] Scrutton J., and the Court of Appeal, had no hesitation in holding that a pre-war contract of marine insurance whereby the goods of a British company were insured with a German insurer was abrogated upon the outbreak of war (no claim had accrued upon the policy). It is significant that Scrutton J. dealt with the two contracts involved—affreightment with a German shipowner and insurance with a German insurer—together and upon precisely the same lines and regarded the cause of abrogation in both cases to be the same, namely, that they involved trading or further trading with the enemy and therefore fell within the principles laid down in *Potts* v. *Bell*[16] and *Esposito* v. *Bowden*.[17]

The strange thing is that it should have been considered necessary, at any time since 1802, to resort to arguments peculiar to insurance, namely, the folly of indemnifying the enemy against losses resulting from British and Allied belligerent action, when there lay ready to hand a principle of general application, namely, that all commercial intercourse with the enemy is illegal. Lord Alvanley C.J. in *Furtado* v. *Rogers* invoked this principle but seemed to regard it as less important than the reason based on indemnity against British capture.

Even in 1914 this ghost was not yet completely laid, and the first Trading with the Enemy Proclamation, dated August 5, contained the following prohibition:—

"Not to make or enter into any new marine, life, fire, or other policy or contract of insurance with or for the benefit of any person resident, carrying on business, or being in the said [German] Empire, nor under any existing policy or contract of insurance to make any payment to or for the benefit of any such person *in respect of any loss due to the belligerent action of His Majesty's Forces or those of any ally of His Majesty.*" (Italics mine.)

This Proclamation was revoked by the Proclamation of September 9, 1914, the corresponding clause in which—paragraph 5 (6)—omitted all reference to the consequences of belligerent action. *Requiescat in pace!*

It is submitted that the following conclusions are justified:—

(*a*) A pre-war contract of marine insurance between a British subject and an enemy in the territorial sense is abrogated on the outbreak of war, whether the British subject or the other party is the insurer and whether the premium has already been paid or not (we shall deal later with non-marine insurance).

(*b*) This rule is not confined to insurance upon commercial property, *e.g.* merchant ships and cargoes, but extends to all property, and is not confined to insurances against the consequences of British or allied belligerent action.[18]

(ii) After these preliminary remarks we can address ourselves to *losses happening and claims accruing before the outbreak of war.*

[14] [1915] 1 K.B. 227. [15] [1915] 2 K.B. 379; [1916] 1 K.B. 495.

[16] (1800) 8 T.R. 548.

[17] (1857) 7 El. & Bl. 763.

[18] Pennant in 18 *L.Q.R.* (1902) 289–296 ("Insurances of Enemies' Property") would not accept this last sentence and holds the view that a pre-war insurance by a British company of an enemy's property is only illegal and void in so far as it relates to property which it is the aim of the British Government to destroy by belligerent action, *i.e.*, "if it would indemnify the enemy against a loss which the British Government intended him to undergo" (p. 293). I do not see how he can reconcile this view with such cases as *Furtado* v. *Rogers* and *Esposito* v. *Bowden*, which enunciates quite general principles.

Harman v. *Kingston*,[19] *Flindt* v. *Waters*[20] and *Janson* v. *Consolidated Mines*[21] show that where a loss has occurred and a right of action upon the policy has accrued to an enemy before the outbreak of war, his right of action is not destroyed but merely suspended until after the war.[22] In the last-named case Lord Lindley quoted with approval the following passage from Arnould:—[23]

"Where the party intended to be insured by the policy does not become an alien enemy until after the loss and cause of action have arisen, his right to sue on the policy is only suspended during the continuance of hostilities and revives on the restoration of peace."[24]

In the cases mentioned above it was the assured who became an enemy. In *Robinson & Co.* v. *Continental Insurance Company of Mannheim*[25] it was the insurance company who became the enemy,[26] and Bailhache J. held that the British assured could sue the company for a pre-war loss during the war.

Actions to recover premiums are rare, and in many policies the receipt of the premium is acknowledged whether it has been paid or not; but if a British assured owed a premium to a foreign insurer upon the outbreak of a war which made the latter an enemy, the right to sue for the premium would be suspended until after the war.

Harman v. *Kingston*, *Flindt* v. *Waters* and *Janson* v. *Driefontein Consolidated Mines* do not lay down a rule peculiar to insurance. We have already noticed authority for the same rule in *Ex parte Boussmaker*,[27] *Ertel Bieber Co.* v. *Rio Tinto Co.*,[28] *and Zinc Corporation* v. *Hirsch*.[29] *Janson* v. *Driefontein Consolidated Mines* deserves notice on three further points: (*a*) That a British underwriter is not likely in these sterner days to be allowed to waive the plea of alien enemy so as to enable an enemy assured to sue him during the war for a pre-war loss; (*b*) that war is war and not merely strained relations and it is for the Executive to tell us (and the Courts) when His Majesty is at war;[30] and (*c*) that an insurance of an enemy against loss or damage caused by his own Government is free from objection. *Nigel Gold Mining Co.* v. *Hoade*[31] also requires consideration. The plaintiff company had been registered in Natal in 1888 and had subsequently received a "supplemental incorporation" in the Transvaal. It was working a gold mine situated in the territory of the Transvaal Republic. Before the South African war it had effected an insurance with the defendant, a Lloyd's underwriter, upon the products of its mine against (*inter alia*) "arrests, restraints, and

[19] (1811) 3 Camp. 150, where Lord Ellenborough C.J. said, in a case upon a policy of marine insurance, "the fact of the persons interested [on whose behalf, it seems, the plaintiffs were suing] having become alien enemies since the loss, only goes to suspend the remedy, and ought not to have been pleaded in abatement." The cause of the loss does not appear.

[20] (1812) 15 East 260.

[21] [1902] A.C. 484. (But it is very unlikely that a British underwriter will again be allowed to waive the plea of alien enemy so as to enable an enemy assured to sue during the war.) See also *Robinson Gold Mining Co.* v. *Alliance Insurance Co.* [1904] A.C. 359.

[22] In the war of 1914 to 1918 and in the present war steps would probably be taken to vest it in the Custodian of Enemy Property.

[23] *Marine Insurance.* (6th ed.) vol. i, p. 135.

[24] Provided, of course, that the British underwriter is not released from payment by the Treaty of Peace and ensuing legislation.

[25] [1915] 1 K.B. 155.

[26] Or at any rate was treated as an enemy, for it does not appear whether the policy was effected with the head office in Mannheim or with the London branch, which in *Ingle* v. *Mannheim Insurance Co.* [1915] 1 K.B. 227 (the same company) was regarded as not being an enemy at common law; in that case the claim accrued after the outbreak of war and the action was allowed to proceed. The Proclamation of September 9, 1914, merely confirmed the common law status of the London branch and the Proclamation of October 8, 1914, had not retrospective application.

[27] (1806) 13 Ves. Jun. 71. [28] [1918] A.C. 260, 269. [29] [1916] 1 K.B. 541, 556.

[30] See paper by the author in *Transactions of the Grotius Society*, vol. II (1926).

[31] [1901] 2 K.B. 849.

detainments of all kings, princes and people." A few days after the outbreak of war the enemy Government seized and carried away certain gold products from the plaintiff company's mine. The mine was closed upon the outbreak of war and there was no evidence of intention to carry on mining operations during the war. Mathew J. declined to invest the plaintiff company with enemy character or to treat their property as enemy property and allowed them to recover their loss on the policy.

We have stated that an underwriter may, apart from any provision to the contrary which may be embodied in the Treaty of Peace, pay to an enemy after the war losses which accrued before the war, though in most cases he will probably be found to have paid them during the war to the Custodian of Enemy Property.[32] It is, however, worth noting that before the war of 1914 to 1918 it was the public and avowed intention of Lloyd's underwriters, and also of most of the companies to waive the plea of alien enemy and hold themselves subject to an honourable obligation to pay to enemies *during* the war losses which accrued *before or during* the war. The avowal, so far as Lloyd's is concerned, is contained in a statement made by the then Chairman of Lloyd's at the International Conference on maritime law at Copenhagen on May 16, 1913.[33] This honourable undertaking which was made in the fullest good faith was (it is submitted) based on a misconception in the minds of the underwriters' advisers as to the nature of the plea of alien enemy and the prohibition of intercourse with enemies. These rules, now at any rate, rest on public policy and not on the protection of the British subject so as to be waivable at his option, and it would be illegal, even apart from the express provisions of the Trading with the Enemy Act, 1939, to carry out such an undertaking. The excuse for the prevalence of such lax views, which remind one of Lord Mansfield's heresy above quoted,[34] must be laid at the door of the House of Lords, who in *Janson's* case[35] ought not to have condoned the action of the underwriters sued by an enemy plaintiff during war in waiving the plea of alien enemy and permitting themselves to be sued. The fact that the war was over when the case reached the House of Lords should (it is submitted) have made no difference, and the case should have been stopped. Even after the declaration of peace, the underwriter cannot be compelled to pay to those who were enemies losses upon pre-war policies which accrued during the war.

(iii) *Dissolution of the contract.*—Apart from losses which have already happened and claims which have already accrued, the effect of the outbreak of war is to dissolve a contract of insurance with an enemy as from that time. The reason is that the contract belongs to the class of contracts which involve intercourse with the enemy. Any particular contract might not ; the premium may have been paid before the war broke out, no loss may occur and no occasion for the assured to communicate with his underwriters. Those considerations are irrelevant. It is the class of contract that matters.[36] Moreover, it is safe to say, upon the analogy of the cases upon long-term contracts for the sale of goods and upon time charters,[37] that, although the duration of a policy upon enemy property may in terms extend beyond the period of a short war, yet it is dissolved and will not revive after the war.

[32] At present in practice British debtors are bound merely to register with the Custodian debts owing to enemies who may be described as " friendly " enemies, *e.g.*, a Dutchman in Holland, whereas they must pay to the Custodian debts due to real enemies.

[33] Printed as an Appendix to the first edition of *Legal Effects of War*, supra, n. 1.

[34] *supra* p. 15

[35] [1902] A.C. 484.

[36] See the writer's paper on the " Effect of War upon Contracts " in *Transactions of the Grotius Society*, vol. xxvii (1941).

[37] E.G. *Ertel Bieber & Co.* v. *Rio Tinto Co.* [1918] A.C. 260 ; *Clapham Steamship Co.* v. *Handels-en-Transport Maatschappij Vulcaan* [1917] 2 K.B. 639.

B. Pre-war Marine Insurances where Neither Party becomes an enemy in the Territorial sense.

This contract, like any other, is dissolved upon the outbreak of war by reason of illegality if in itself it involves intercourse with the enemy, or if it is ancillary to a transaction involving intercourse with the enemy or is otherwise detrimental to the interests of this country.

(i) *Involving intercourse with the enemy.*—This factor is not likely to occur except in the case where the insurer or the assured is an enemy, and that case has already been considered. It is, however, possible to imagine circumstances in which ite might occur ; for instance, where the broker effecting the insurance becomes an enemy and further communication with him after the outbreak of war might be involved.

(ii) *Upon illegal trading with the enemy.*—One of the commonest causes of dissolution occurs when the insurance covers property involved in unlicensed trading with the enemy. There is no doubt since *The Panariellos*[38] that the contract is also dissolved when the property covered and involved in trading with the enemy belongs to the nationals of an allied Power which is co-belligerent with Great Britain.

(iii) *Upon licensed trading with the enemy.*—The effect of a licence granted to a British or an enemy subject permitting trading with the enemy legalizes not only the trading transaction but ancillary contracts such as affreightment and insurance.[39]

(iv) *Indemnity against the consequences of carriage of contraband, blockade-running and other unneutral service.*—The case of insurances upon the property of neutral subjects requires more detailed consideration. Aid rendered by neutral subjects to a belligerent in the form of carriage of contraband, blockade-running or other " unneutral service " (as it is called in the unratified Declaration of London) is not regarded as illegal by the municipal law of England, though the British Government recognizes the right of a belligerent to protect himself against these practices by the capture and condemnation of ships and cargoes involved in them.

Great Britain a Neutral.—Thus, when Great Britain is a neutral, insurances (effected either before or during the war) by British insurers upon such ventures, whether undertaken by British subjects or others, are not illegal,[40] though the outbreak of war, or some development of the war, may, by converting a peaceful voyage into a blockade-running expedition or an innocent cargo into a contraband one, affect the continued validity of the policy ; that is a question of its terms and of the circumstances which attended its making. The question of concealment may easily arise upon such policies.

Great Britain a Belligerent.—When, however, Great Britain is a belligerent, a different attitude towards the activities of neutral subjects must be adopted. Their property involved in attempts to aid or supply Great Britain is lawfully insurable by British insurers ; if involved in attempts to aid or supply the enemy, it is not. On grounds of general principle it is inconceivable that a British underwriter should be allowed to pay in the latter case, whether the policy was issued before or during the war, and thus indemnify a neutral subject—whether the loss or damage arises from British capture or perils of the seas—in respect of property involved in succouring Great Britain's enemy. Such a contract would, in the words of Lord Alvanley C.J.,[41] be a " contract to do [something] which

[38] (1915) 31 T.L.R. 326 ; (1916) 32 T.L.R. 459 (J.C.).

[39] See later, p. 23 .

[40] *Hobbs* v. *Henning* (1864) 17 C.B. (N.S.) 791 (where the ship was the " Peterhof," which gave her name to one of the leading American prize decisions of the Civil War ; *Seymour* v. *London & Provincial Marine* (1872) 41 L.J.C.P. 193 (" warranted no contraband of war ").

[41] In *Furtado* v. *Rogers* (1802) 3 Bos. & P. 191, 198.

may be detrimental to the interests of his own country." It is just as absurd to indemnify a neutral subject as an enemy subject against the consequences of British capture.[42]

Suppose, however, that before or during the present war a British insurance company has issued to a firm in a country which remains neutral a policy which includes war risks generally, and the proper law of the contract is the law of the neutral country because, for instance, the policy was either issued by a branch in the neutral country or, if issued in England, contained a clause accepting the neutral country's law and jurisdiction, and a loss arises owing to British capture, what is the position of the assured? That he cannot recover in England is shown by *Dynamit Actien-Gesellschaft* v. *Rio Tinto Co.*[43] Can he recover in the neutral country?[44] An answer to this question depends on the law of the neutral country, and it would not be in the least surprising to find judgment being given against the British company, provided that the municipal law of the country contained no specific provision (as, for instance, the law of the United States did for a time) making such ventures as the carriage of contraband or breach of blockade illegal and provided that there was no concealment. A judgment could be enforced against the assets of the British company in the neutral country, but it seems probable that the judgment—being based upon an insurance against the consequences of British capture—could not be enforced in this country.[45]

There is no objection to a policy of insurance issued before or during the war by a British subject to cover the property of a British subject against loss or damage resulting from enemy action or from action taken to avert or minimize enemy action, provided that the property is not involved in trading with the enemy. Nor is there any objection to such an insurance upon the property of the subject of a neutral State, provided that it is not involved in the carriage of contraband to Great Britain's enemy or the breach of a British blockade or in some other activity hostile to Great Britain.

C. Contracts of Marine Insurance Effected during the War.

Except by licence of the Crown, express or implied, no valid contract of insurance can be made during the war between a person in this country and an enemy in the territorial sense, whichever of them may be insurer or assured.

This rule results from general principle but was only established on a firm foundation in the year 1800 by the judgment of the Court of King's Bench in *Potts* v. *Bell*,[46] a decision of great importance, for Park J. in *Willison* v. *Patteson*[47] said of it: "Before the case of *Potts* v. *Bell*, there was an opinion prevalent in Westminster Hall, that the commerce with an enemy was not illegal." In *Potts* v. *Bell* the plaintiffs, who insured their interest in the goods, were British

[42] Arthur Cohen, K.C., a very considerable authority on marine insurance, expressed the view in Halsbury, *Laws of England*, vol. 17, s. 844, that "as a general rule, whenever any property is according to prize law as administered by the courts of this country liable to British capture, the insurance in this country on such property [query, against any risks] is illegal and void." See Hailsham, vol. 18, s. 412. [43] [1918] A.C. 260, 292, 294.

[44] Arnould, *Marine Insurance* (12th ed. 1939), s. 765, states that such a loss could be recovered in a neutral country against a neutral insurer.

[45] The Exception to Dicey's Rule 114 suggests that the foreign judgment would not be enforceable here. I am aware of no clear authority. It is worth mentioning that under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, one of the grounds upon which the registration of the foreign judgment must be set aside is that its enforcement would be contrary to public policy in England. The analogy of *Dynamit Actien-Gesellschaft* v. *Rio Tinto Co.* [1918] 260, 292, 294, may be invoked. If "it is illegal for a British subject to become bound [by the interpretation placed upon his admittedly foreign contract by foreign law] in a manner which sins against the public policy of the King's realm," it is arguable that a foreign judgment should be exposed to the same defence.

[46] (1800) 8 T.R. 548. [47] (1817) 7 Taunt. 439, 449.

merchants carrying on business in London ; the policy on ship and goods was subscribed in London by the defendant (apparently British), and was dated December 7, 1797 ; the ship was Prussian (neutral) ; but the voyage, which began on December 18, was from Rotterdam, an enemy port, to Hull, and thus involved trading with the enemy, for Great Britain and Holland (under a puppet Franco-phile Government) were at war; the loss was due to capture by a French enemy ship. The plaintiff failed to recover on the policy, and the reason given in a regrettably terse judgment[48] is that " it might now be taken that it was a principle of the common law that trading with an enemy without the King's licence was illegal in British subjects." Counsel for the successful defendant contended that the policy was " void," that is, void *ab initio*.

Moreover, the premium paid in respect of an insurance which is void *ab initio* by reason of this kind of illegality, cannot be recovered back from the underwriter.[49]

An express licence to insure enemy property or to effect an insurance with an enemy is rarely, if ever, granted. But when the Crown licences a particular trading transaction or a particular kind of trade with the enemy, or trading generally with him, it thereby licences by implication the contracts usually ancillary to the main contract, *e.g.* insurance and affreightment. Thus in *Usparicha* v. *Noble,*[50] a Spaniard resident in this country during war between Great Britain and Spain was licensed by the Crown to ship goods by a (neutral) Prussian vessel from this country to Spain and insured the goods with the defendant, who was apparently a British underwriter ; it was agreed at the time of the action that the plaintiff had shipped the goods on account of correspondents who were residing in enemy territory and not on his own account ; the goods were lost owing to capture by a French privateer, a loss covered by the policy ; the plaintiff recovered upon the policy, for " The Crown, in licensing the end, impliedly licences all the ordinary legitimate means of attaining that end.[51]

We must now mention briefly three groups of cases which do not illustrate the impact of war upon the general principles of the law of marine insurance so much as the interpretation of certain expressions of frequent occurrence in policies.

D. The Effect of War in Producing a Frustration of the Voyage or Adventure.[52]

The decision of the judge of first instance, Bailhache J., in *British and Foreign Marine Insurance Co.* v. *Sanday,*[53] probably caused more consternation

[48] The arguments are valuable and are fully reported.

[49] *Vandyck* v. *Hewitt* (1800) 1 East 96. [50] (1811) 13 East. 332. [51] At p. 341.

[52] For a case upon the effect of war in producing a constructive total loss, see *Polurrian Steamship Co.* v. *Young* [1915] 1 K.B. 922 (C.A.). The suggestion made by Bailhache J. *obiter* in *Mitsui* v. *Mumford* [1915] 2 K.B. 27 (timber in Antwerp on the outbreak of war in August, 1914) that the doctrine of constructive total loss is not confined to marine insurance and that an analogous principle (minus notice of abandonment) applies to an insurance upon goods on land, appears to have influenced Bray J. in *Campbell & Phillips* v. *Denman* (1915) 21 Com. Cas. 357 (also goods in Antwerp in August, 1914). This suggestion was disapproved by Lord Atkinson in delivering the judgment of the House of Lords in *Moore* v. *Evans* [1918] A.C. 185, where incidentally he pointed out (at p. 194) that the doctrine of constructive total loss based upon notice of abandonment had its origin in cases of capture. In *Moore* v. *Evans* it was held that a non-marine policy for twelve months issued in January, 1914, to a firm of London jewellers on pearls in Brussels and Frankfort-on-Main against " loss of and/or damage or misfortune to " the goods was a policy on goods and not on an adventure, so that the mere fact that as a result of the outbreak of war they were unable to recover possession of their pearls did not constitute a loss upon the policy, there being no evidence that the jewellery had not remained in the possession of the consignees in Brussels and Frankfort or their bankers.

[53] [1915] 2 K.B. 781 (decisions of Bailhache J. and Court of Appeal); affirmed [1916] 1 A.C. 650.

in the limited community which it affected than any other decision during the war of 1914 to 1918 gave rise to in that or any other section of the mercantile community. The plaintiffs were the British owners of cargo laden on board two British vessels on the high seas upon the outbreak of the war of 1914 to 1918 and consigned to Hamburg. One vessel on August 9 was " stopped by a French cruiser and told to go to Falmouth for security " ; the other, in response to a pre-war suggestion from the Admiralty was, on August 7 diverted by her owners to a British port. The plaintiffs warehoused the goods and on September 7 gave notice of abandonment and claimed for a constructive total loss. The usual F.C. and S. clause had been deleted in consideration of an extra premium, and the material perils insured against in the body of the policy were "takings at sea, arrests, restraints, and detainments of all kings, princes and people of what nation, condition, or quality soever." The first point taken by and decided against the underwriters was that the Marine Insurance Act, 1906, had not abrogated the old rule that: " Upon an insurance on goods . . . the frustration of the adventure by an insured peril is a loss recoverable against underwriters, though the goods themselves are safe and sound."[54]

There was nothing startling about that. The " subject-matter " of an insurance of goods from A to B is not merely the physical existence of the goods but their transportation and safe arrival.

But upon the second question—whether the loss was by a peril insured against—it was contended by the underwriters (*a*) that the restraint clause in the policy must be taken not to include restraints, or at any rate proper and legal restraints, by the British Government, and (*b*) that even if the " municipal law of this country and the authoritative acts of the British Government " were covered, restraint connoted the actual use of physical force and did not comprise mere voluntary compliance with the law of the country or the commands of the Government.[55]

Bailhache J., in a judgment which was affirmed by the Court of Appeal (Swinfen Eady L.J. dissenting) and by the House of Lords unanimously, held (a) that the proximate cause of the loss was a restraint of princes which " took the form of the common law, which upon the outbreak of war sprang automatically into force, and of the commands issued by proclamation,"[56] namely, not to navigate a ship or carry goods to a German port ; and (*b*) that the restraints clause included restraints by the British Government. Upon (*a*) Earl Loreburn remarked that he was " not pressed by the circumstance that force was neither exerted nor present, for force is in reserve behind every State command,"[57] and in a later case[58] Lord Sumner pointed out that the ground of the decision in *Sanday's* case was " the illegality of any further prosecution of the voyage, both ship and master being British." Upon (*b*) the authority for including restraints by the British Government rested almost entirely upon the works of Marshall, Phillips and Arnould, but no authority was necessary, for the words of the clause clearly include the British Government, unless some more limited meaning could be given to it by custom or was demanded by some rule of public policy.[59]

[54] [1916] 1 A.C. at p. 656.

[55] The case of an illegal or *ultra vires* requisition by the British Government was considered by Bailhache J. in *Russian Bank for Foreign Trade* v. *Excess Insurance Co.* [1918] 2 K.B. 123.

[56] [1915] 2 K.B. at p. 789.

[57] [1916] 1 A.C. at p. 659 ; and see Lord Wright in *Richards* v. *Forestal Land, etc., Co.* [1941] 3 All. E.R. at p. 77.

[58] *Becker Gray & Co.* v. *London Assurance Corporation* [1918] A.C. 101, 117. Note also Willes J. in *Esposito* v. *Bowden* (1857) 7 El. & Bl. 763, 781 : " The force of a declaration of war is equal to an Act of Parliament prohibiting intercourse with the enemy except by the Queen's licence."

[59] The decision was followed by Atkin J. in *Associated Oil Carriers, Limited*, v. *Union Insurance Society of Canton* [1917] 2 K.B. 184 (insurance on freight).

The effect of his judgment upon the marine insurance community can only be compared to that of the first German gas attack in 1915. It had never been decided, and it had probably never before entered the head of a broker or underwriter that British restraints were included in the ordinary restraints clause in the body of the policy ; such a decision upon so venerable a document was equivalent to laying hands upon the ark of the covenant of marine insurance. The ocean suddenly became dense with constructive total losses, and Lloyd's underwriters quickly devised the following clause:—

British and Allies Capture Clause, 1916.

" Warranted free of any claim arising from capture, seizure, arrest, restraint or detainment, except by the enemies of Great Britain or by the enemies of the country to which the assured or the ship belongs.

In 1919 this clause was superseded by one of a more permanent character as follows:—

" Warranted free of any claim based upon loss of, or frustration of, the insured voyage or adventure, caused by arrests, restraints, or detainments of kings, princes or peoples."[60]

This clause is also used in the case of hulls and freights insured for the voyage.

A case in which *Sanday's* case was invoked and which followed it up to the House of Lords, is *Becker, Gray & Co.* v. *London Assurance Corporation*.[61] The plaintiffs were British merchants owning a cargo of jute laden on board a German steamship, the *Kattenturm,* which at the outbreak of war was on a voyage from Calcutta to Hamburg, the jute having been shipped under a c.i.f. contract. On August 3 she left Malta bound westwards, later heard of the declaration of war, and, voluntarily and without being chased, entered the then neutral port of Messina where she arrived on the 6th ; after lying there for about a month she proceeded to Syracuse. A letter from the British Admiralty, which was treated as evidence, stated that:—

" Any German steamer proceeding on or after August 5 last through the Mediterranean on a voyage to Hamburg would, in their Lordships' opinion, have been in peril of capture by British or allied warships when outside neutral waters."

On September 1 the plaintiffs gave notice of abandonment to the underwriters. As in *Sanday's* case, the F.C. and S. clause had been deleted upon payment of an extra premium, and the perils insured against included " men-of-war, . . . enemies . . . takings at sea, arrests, restraints and detainments of all kings, princes and people of what nation, condition, or quality whatsoever."

All three Courts had no difficulty in distinguishing the case from *Sanday's* case, and in giving judgment for the defendant. The adventure was frustrated when the master prudently put into Messina with no thought of resuming his voyage until after the war. " It was self-restraint, not restraint of princes, that hindered the captain from putting to sea " (per Lord Sumner).[62] It was not illegal, as in *Sanday's* case, for him to continue his voyage. To the plaintiffs' other main point, that there was a constructive loss due to the peril of capture, the answer was that the loss was due not to the peril of capture but to the fear of it, and the peril had not yet begun to operate. Moreover, the voluntary act of the

[60] The appropriate method of using the new clause was described in a statement appearing in *Lloyd's List* of June 19, 1919, and printed on pp. 143, 144 of the writer's *Legal Effects of War* (1920). The attitude of underwriters towards the risks disclosed by *Sanday's* case and now intended to be excluded by the Frustration clause and imposed upon shipowners and merchants raises a big question which is economic rather than legal. A view which is critical of the underwriters' attitude found expression in two letters from the late Mr. Charles Wright of Lloyd's to *The Times* Newspaper published on July 31 and August 5, 1919.

[61] [1915] 3 K.B. 410 ; [1916] 2 K.B. 156 ; [1918] A.C. 101. [62] [1918] A.C. at p. 111.

master intervened between the occurrence of any peril insured against and the loss, so that it could not be said that any peril was the proximate cause of the loss.

There the question remained until the outbreak of the present war gave rise to three test cases of great importance—*Forestal Land, Timber and Railways Co.* v. *Rickards*: *Middows* v. *Robertson*: and *W. W. Howard Brothers & Co.* v. *Kahn*,[63] which were tried together by Hilbery J. and went to the Court of Appeal and the House of Lords. The policies, though not identical, were similar enough to raise the same main point of law. They all covered cargoes against both marine and war risks, and they were all subject to the diminution of war risks resulting from the inclusion of the so-called "Frustration Clause," which was in the form introduced after *Sanday's* case and quoted above,[64] with the irrelevant exception that the concluding words were "kings princes peoples usurpers or persons attempting to usurp power." The main question was whether in the circumstances the loss fell within the risks *included* in the war risks clause or within the risks excluded by the Frustration Clause.

The cargoes were all on board German steamers which were pursuing their voyages when the war broke out. The masters of the steamers had been instructed that in the event of war between Germany and Great Britain they must either enter a German port or, rather than be captured, scuttle their ships. One reached a German port, the other two were scuttled to avoid capture.

In all three cases the owners of cargo lost their cargo, and in the absence of the Frustration Clause could have recovered under their policies on the ground that there was a constructive total loss due to one or more of the war risks enumerated therein, such as "men-of-war . . . enemies . . . surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes and people. . . .," when the masters acted upon the instructions of their Government so that the cargoes were converted to the use of that Government, with the consequences described above. It was, however, argued that the loss in these cases was due to the frustration of the adventure arising from a restraint of princes, namely, the orders of the German Government and the execution of those orders by the masters of the ships, and that this was a risk excluded by the Frustration Clause. The answer to this contention given by the Court of Appeal (reversing Hilbery J.) and upheld by the House of Lords was that loss of goods and "loss of, or frustration of, the insured voyage or adventure" are not identical or co-terminous. The risk to the goods and the risk to the voyage or adventure are different risks. The latter risk, unless excluded by the Frustration Clause, is an additional risk, not an essential part of the former risk. In the words of Lord Wright:—[65]

"The primary subject of the insurance is the goods as physical things, but there is superimposed an interest in the safe arrival of the goods . . . a policy on goods is in truth one covering a composite interest, the physical things or chattels and also the expected benefit from their arrival. The subject-matter may be described as chattels-cum-adventure . . . the adventure may be lost even though the goods are neither damaged nor lost nor taken from the assured's possession or control.[66] . . . To cases of that type the frustration clause has a clear and precise application. In my opinion, however, it cannot be applied to a case where the assured is claiming for the loss of, or damage to, the actual physical things or chattels. He is entitled to resist the application of the clause on the ground that the primary subject-matter is the goods, and that the adventure is merely ancillary or accessory . . ."

Accordingly, the Frustration Clause did not protect the underwriters, and the cargo-owners recovered. The foregoing summary is a simplification, but, I think, not an over-simplification of facts and points of law that were not

[63] [1941] 1 K.B. 225; [1941] 3 All. E.R. 62.
[64] P. 25. [65] At pp. 83, 84. [66] *E.g.*, *Sanday's* case, *supra*, p. 23.

identical in all three cases. It does not do justice to a controversy which evoked arguments of great acuity and a series of impressive judgments, but it will be pardoned on grounds of space if it has made clear the main question which was raised and answered—a question extending far beyond the impact of war upon the traditional Lloyd's form of marine and war risks policy.

E. There are two other questions which arise frequently during war and form the subject of numerous decisions. They also do not illustrate the effect of the impact of war upon principles of law, and we propose to do little more than call attention to their existence.

The first question owes its prominence to the German policy of "spurlos versenkt"[67] adopted during the war of 1914 to 1918. It arises when it is not clearly apparent whether a missing ship was lost by perils of the seas or by war risks, and she was insured with one set of underwriters or one company against marine risks and with another set of underwriters or another company against war risks, or is only insured against one or the other of these classes of risks. Who is to pay? The decisions given during the last war are numerous and will be found in Arnould.[68] The law was carefully examined by Bailhache J. in *Munro, Brice & Co.* v. *War Risks Association*,[69] though the Court of Appeal held that his inference of fact was wrong.[70]

F. The second question, or group of questions, is purely a matter of interpretation. It has been productive of a very large number of decisions, which, not unlike the innumerable decisions upon testamentary expressions, are of great importance to the parties litigating, but make little contribution to the development of the law. In its commonest form, the question is: What is the meaning of "consequences of hostilities or warlike operations" or similar expressions occurring in a policy amongst the substantive risks insured or in a clause excepting them from the scope of the policy. (The same and similar expressions occur in charter parties upon the terms of which ships are requisitioned by the appropriate Department, which usually accepts the risks mentioned above.) The principal decisions given during the war of 1914 to 1918 are discussed by Arnould.[71] A new crop is already beginning to accumulate.[72]

G. Fire and other Non-Marine Insurance upon Property.

Pre-war Insurances.—Do these insurances fall under the general principles which have already been discussed, or are they governed by special rules of their own?

My submission is that, once the marine insurance cases had freed themselves from the early notion that illegality consisted in indemnifying an enemy against the consequences of British or co-belligerent capture, they form a particular application of the general principle of the abrogation of executory contracts between British subjects and enemies in the territorial sense, and that all annual insurances of property, marine or non-marine, are governed by this principle.

In *Janson* v. *Driefontein Consolidated Mines*[73] and in *Robinson Gold Mining Co.* v. *Alliance Assurance Co.*,[74] the policies were both marine policies and the losses occurred on land through seizure by a foreign Government *before* and in anticipation of war with Great Britain. In the former case the plaintiff company

[67] The expression occurred in an intercepted despatch from the German *chargé d'affaires* in Argentina to his Government in 1917, in which he recommended the application of this policy to Argentinian ships: Garner, *International Law and the World War*, s. 490.

[68] *Op. cit.* ss. 905a, 905b. [69] [1918] 2 K.B. 78.

[70] *Munro, Brice & Co.* v. *Marten: Same* v. *The King* [1920] 3 K.B. 94.

[71] *Op. cit.* ss. 905c–905f.

[72] *J. Wharton Shipping Co.* v. *Mortleman* (1941) 57 T.L.R. 189, 514; *Yorkshire Dale Steamship Co.* v. *Minister of War Transport, ibid.* 637, 676.

[73] [1902] A.C. 484. [74] [1904] A.C. 359.

was enemy in the territorial sense when the writ was issued; in the latter case the plaintiff company had been enemy, but the war was officially at an end before the writ was issued. It was not suggested that the fact that the losses occurred on land attracted rules of law different from those that governed marine insurance.[75]

From the point of view of the general principle that all[76] pre-war contracts which involve intercourse with the enemy are abrogated upon the outbreak of war (with a saving for rights of action already accrued), I can see no difference whatever between marine insurance and any other kind of insurance upon property. If the premium has already been paid, there would be no intercourse with the enemy unless a loss occurred; but that is quite immaterial, because the parties, in making the contract, contemplate that, if a loss occurs during its currency, intercourse between them must take place for the purposes of its settlement and payment. It is, therefore, not surprising that in *Excess Insurance Co.* v. *Mathews*[77] it was assumed that a pre-war policy issued by a British insurance company to a Hungarian company against loss by fire upon the profits of a mill in Hungary would have been abrogated by the outbreak of war between Great Britain and Hungary if the Treaty of Peace between those countries had not preserved its validity. By reason of the provisions of the Treaty the British insurance company paid under the Clearing House procedure a loss incurred by the Hungarian company, and thereupon succeeded in this action in recovering the proportionate amount due from one of their reinsurers, the defendant.

But for the fact that the generality of the principle of abrogation referred to above as general is doubted by high text-book authority, it would not seem necessary to say anything more upon the matter. But Macgillivray, who analyzes the question more deeply and more carefully than any other authority known to me, expresses doubts. He writes:—[78]

"Two distinct principles of public policy may be extracted from the marine insurance cases, *viz.*: (*a*) that as one of the main objects of war is to destroy the enemy's commerce a contract of indemnity is illegal in so far as it operates to indemnify an enemy against commercial losses during war, and (*b*) that a contract is illegal in so far as it operates to indemnify an enemy against any of the consequences of war. Although there are *dicta* in some of the cases which, taken by themselves and apart from the decision involved in the case would appear to support wider principles of public policy, there does not appear to be any reliable authority for the propositions sometimes contended for (*a*) that a contract is illegal in so far as it operates to indemnify an enemy against any loss arising during war, or (*b*) that a contract is illegal in so far as it operates to protect a British subject or an alien friend against any loss inflicted by British or allied arms during war."[79]

[75] In *Nigel Gold Mining Co.* v. *Hoade* [1901] 2 K.B. 849, the policy was not a marine one. It merely insured the plaintiff company's property while on the premises at its mine in the Transvaal and would normally have been followed by another policy to cover transit to England. The seizure by the Government of the South African Republic took place at the mine *during* the war. The national character of the plaintiff company was ambiguous, but the learned judge preferred to regard it as British, and the war was at an end before the writ was issued. Not a satisfactory case.

[76] See the writer's paper on the "Effect of War upon Contracts" in *Transactions of Grotius Society*, 1941, for certain exceptions.

[77] (1925) 31 Com. Cas. 43. [78] *Insurance Law*, (2nd ed. 1937), p. 280.

[79] With regard to (*b*), which is not relevant to the point which I am seeking to establish, I would only agree where the property lost or damaged was involved in some undertaking inimical to the success of British or allied arms such as trading with the enemy in the case of a British or allied subject, or the carriage of contraband, breach of blockade, or other unneutral service being rendered to our enemy by a neutral subject. I can see nothing illegal in a policy which protected a British or neutral subject against, say, the detention of a ship in port to prevent her from falling into the hands of the enemy with the result that a perishable cargo was ruined or the sinking of a British ship in order to avoid capture by the enemy or the destruction of house property in order to procure an unobstructed field of fire.

He then submits certain propositions, of which the following is one:—[80]

(3) " It is not illegal for a British office to contract to pay the assured " [though doubtless he implies that payment to the assured would be deferred until after the war] " a sum of money on the happening of an event occurring during the prosecution of hostilities between the assured's country and Great Britain, provided such event occurs independently of such hostilities and is not a commercial loss."

Let us take the case of a policy issued in July, 1939, whereby a British underwriter insured a German householder in Germany against loss by ordinary fire or burglary for a period of twelve months. No loss has occurred before the outbreak of war on September 3, 1939. Surely the authorities already cited must drive us to the conclusion that upon the outbreak of war this policy was abrogated,[81] for the reason that it is an executory contract involving intercourse with the enemy (*Furtado* v. *Rogers*,[82] and *Esposito* v. *Bowden*).[83]

With great respect I suggest that his qualification, " provided such event occurs independently of hostilities and is not a commercial loss," is derived from an age when the rule governing marine insurance had not been subsumed under the general principle of abrogation of executory contracts involving intercourse with the enemy.[84]

Insurances effected during war.—There can be no doubt that, as in the case of marine insurance, no contract of non-marine insurance can be made during a war between a person in this country and an enemy in the territorial sense, whichever of them may be insurer or assured. The annual renewal of the ordinary contract of fire or other non-marine insurance of property involves the making of a new contract each year.

[80] Op. cit., p. 281. See also at p. 288: " It is submitted that a contract of insurance [*scilicet*, non-marine] is never dissolved by war."

[81] Macgillivray would not agree—see p. 283. I entirely concur in his statement (on p. 287) that " fire policies and others which are renewable only upon acceptance of the renewal premium " cannot be renewed during war when one party is an enemy because intercourse with the enemy would be involved. The continued existence of the contract embodied in the policy after the outbreak of war involves a potential intercourse with the enemy, and that is why in my submission it is abrogated.

[82] *Supra* n. 5.

[83] *Supra* n. 18, 58.

[84] See also Pennant in 18 *L.Q.R.* (1902) pp. 289–296 (" Insurances of Enemies' Property) and my comment, above.

NULLUM CRIMEN SINE LEGE.

[*Contributed by* Professor Dr. Stefan Glaser, *of Poland.*]

The genesis of the principle *nullum crimen sine lege* as being the basis of democratic criminal law is a matter upon which there is room for differences of opinion. Some affirm an English origin, deriving the principle from Article 39 of Magna Carta, 1215, which forbids the punishment of a free man *nisi per legale judicium parium suorum vel per legem terrae ;* they quote further the Petition of Rights, 1628, and refer finally to the considerable consideration and development of the principles in English literature, notably in the writings of Locke and of Blackstone. Hence it passed into the constitutional law of the United States.[1] Here, in the beginning, it found its roots in the law of the colonies,[2] afterwards it was more clearly expressed in the memorable Declaration of Rights of the first continental congress in Philadelphia in October, 1774 ;[3] that declaration constituted the basis of those subsequent bills of rights, which, in their turn, under various modifications, pervaded all American constitutional charters.[4] Finally it found access, in a precise formulation, into the constitution of the United States[5] as well as into the constitutions of almost every State in the Union.[6]

[1] Cf., especially as to this, Kent, *Commentaries on American Law,* 12th ed., by O. W. Holmes, Boston, 1873, II, pp. 8 *et seq.*

[2] Cf. Kent, *op. cit.*, II, pp. 1 *et seq.* ; cf. also Hazard, *State Papers,* I, Philad., 1792, pp. 408, 487.

[3] Cf. Story, *Commentaries on the Constitution of the United States,* 1851, I, p. 138. The House of Representatives in Massachusetts, the House of Assembly in New York, and the House of Burgesses in Virginia, took an early and distinguished part, upon the first promulgation of English measures and taxation, in the assertion of their rights as freeborn English subjects. The claim to common law rights soon became a topic of universal concern and national vindication. In October, 1765, a convention of delegates from nine coloniel assembled at New York, amd made and published a declaration of rights, in which they insisted that the people of the colonies were entitled to all the inherent rights and liberties of English subjects, of which the most essential were : the exclusive power to tax themselves, and the privilege of trial by jury. The sense of America was, however, more fully ascertained, and more explicitly and solemnly promulgated, in the Declaration of Rights of the first Continental Congress in October, 1774, and which was a representation of all the colonies except Georgia. This Declaration set down, amongst other things, " that the respective colonies were entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law."

[4] Cf. Perley Poore, *The Federal and State Constitutions, Colonial Charters, and other organic laws of the United States,* 1877. An example of the respective enactments is the Bill of Rights of Virginia, of 1776 : " That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of twelve men of his vicinage, without whose unanimous consent he cannot be found guilty ; nor can he be compelled to give evidence against himself ; that no man be deprived of his liberty, except by the law of the land or the judgment of his peers." Cf. Poore, *op. cit.*, II, p. 1909. Likewise the Constitutions of Connecticut, 1776, Art. 4, of Massachussets, 1780, Art. XII in fine, of Maryland, 1776, Art. XXI, of Pennsylvania, 1776, Art. IX, etc.

[5] The Constitution of the United States of March 4, 1789—the day which had been fixed for commencing the operations of Government under the New Constitution, and on which the Constitution had been ratified by the conventions chosen in each State—lays down in Art. I, s. 9 (3) that : " No bill of attainder, or *ex post facto* law, shall be passed."

[6] Cf., *e.g.*, the Constitution of Maryland, 1867, Art. 17, of North Carolina, 1876, sec. 32, etc. Almost all these constitutions express the principle in question in the form of interdiction of the retrospective activity of laws. Cf. Kettleborough, *The State Constitutions,* 1918.

In some of them the Declaration of Rights was later considerably enlarged, during the revision.[7]

Others deny the English origin of the principle, on the ground of the admitted fact that English criminal law is (largely) based on the common law, whereas in the maxim the word *lege* means statute-law. They regard the principle, on both its constitutional and its criminal side as a natural and comprehensible consequence of the French Revolution, which was at the same time a revolution of " individualism against socialism," and which has created the idea of the Law-State, instead of that of the Administrative-State. The principle, *nulla poena sine lege,* adopted by the French constitutional laws of 1789 and 1791, penetrated simultaneously as a postulate of policy and of theory, into German laws and into other modern legislation.[8]

In any case, it is certain that the principle in question, having been adopted in Europe since the end of the XVIIIth century, was thereafter elaborated in the XIXth century, as a reaction against the system of absolute discretion in the sphere of legislation and jurisprudence: the discretionary power of the judge to fill up *lacunæ* in the law results in uncertainty as to what the law is and what the punishment, with the further consequence that punishments are unequal, varying according to the social position of the condemned, and often that punishment is inflicted on the innocent. In the XIXth century there began a revolt against this state of affairs and an insistence on the subordination of the judge to law. The exaggerated consequence of that tendency already expressed by philosophers and encyclopedists of the XVIIIth century, especially by Montesquieu in France and by Cesar Beccaria in Italy, was that even the judge was forbidden all power to interpret the law.[9] The principle, *nullum crimen sine lege,* was invoked as a guarantee of civic liberty against the omnipotence and despotism of the State and of the judge.

As a legislative measure the principle was first adopted by the Austrian law of 1787 of Joseph II. This law, although tyrannical, sets out in paragraph I: " Only such illegal acts are to be considered and treated as crimes which have been enumerated in the present law."[10]

Henceforth the application of analogy to the disadvantage of the accused was no longer admissible: the judge was subjected to the law. Subsequently this principle was proclaimed in France by article 8 of the Declaration of the Rights of Man of August 26, 1789, in the following words: " The law may establish only such punishments as are strictly necessary. No one may be punished except according to a law enacted and promulgated before the commission of the offence and lawfully applied."

[7] Especially in the revision of the constitution of New York, in 1821, the declaration of rights was considerably enlarged. Cf. Kent., *op. cit.* II, p. 9.

[8] This point of view was represented recently, especially by Gerland, *Nulla poena sine lege,* in his work *Die Grundrechte und Grundpflichten der Reichsverfassung* (by H. C. Nipperdey), I, 1929, pp. 369 *et seq.* Gerland's opinion is that the principle in question owes its origin especially to a political factor: the action of constitutional law plays the most important part in its evolution. The principle is seen to be a most efficient guarantee of civic liberty and of the security of the law. Only later has this principle been developed and deepened from the point of view of criminal law, especially by Feuerbach, who in his theory of " psychological constraint " demonstrated with great ingenuity that one has no right to punish until the threat of legal punishment has proved ineffective; in other words: the law must always precede the punishment. In the same sense also Elvers, *Die Bedeutung des Satzes, nulla poena sine lege*—n.d.—p. 73.

[9] This was an exaggerated reaction against the abuses which came from the unlimited discretionary power of the judge. The preface of the *Corpus iuris Fridericiani* of 1749–51 forbids, under threat of severe punishment, the elaboration of commentaries. Compare Hälschner, *Das Gemeine deutsche Strafrecht,* I–II, 1881–87, p. 178 s., and Hippel, *Deutsches Strafrecht,* I, 1925, p. 276. Even the Bavarian Code of 1813 allows by way of interpretation only official observations. Compare Hippel, *op. cit.* II, 1930–33.

[10] Cf. Stooss, *Lehrbuch des österreichischen Strafrechts,* 1913, 37.

The Constitutional Assembly (l'Assemblée Constituante) of January 21, 1790, applying to criminal legislation the rules propounded by the Declaration, confirmed, amongst other things, that offences can be defined, and punishments can be applied only by law.[11]

Some years later, the same principle entered into paragraph 9 of the Prussian law (Preussisches Landrecht) of February 5, 1794 (which came into force June 1, 1794).[12]

These first legislative enactments served as a model for the criminal legislation of all civilized States. We can say, without exaggeration, that henceforth this principle is the fundamental basis of modern, civilized criminal legislation. It has not only been adopted by penal laws, but it has also been guaranteed by the greater part of constitutional laws. In this way it came to be regarded as a fundamental right of the citizen. The formulation, *nullum crimen, nulla poena sine lege,* is due to the eminent Anselm Feuerbach.[13]

Affirming that the principle in question became a general and universal rule, we wish to draw attention to certain exceptions, which are not numerous and can be explained by special reasons.[14]

It is, above all, in England—the country which is supposed to have given birth to this idea—where the principle is unknown. This is comprehensible, when we take into consideration that the greater part of English penal law is based not on statute law, but on customs or common law. Such law, as is well known, is formed especially by judgments of the courts (case-law or judicial "legislation"). Moreover, even English statute-law has been characterized by a lack of distinct and precise definition of the nature of offences. But it would be wrong to conclude from this that the English judicial practice would be disposed to create new forms of criminal offence. On the contrary, it is a characteristic feature of the spirit of English jurisprudence that only such an act can be considered as punishable the illegality of which corresponds entirely to the common legal conscience and to the ancient judicial practice.[15]

[11] Cf. Vidal-Magnol, *Cours de Droit criminel et de Science pénitentiaire*, 1927, I, 22.

[12] Cf. Hippel, *op. cit.*, I 277, II 34.

[13] Feuerbach, *Lehrbuch des peinlichen Rechtes*, par. 20; cf. Gerland, *op. cit.* 383, and Hippel, *op. cit.*, I 293 s., II 33.

[14] The Germanic criminal law was based originally on custom; this continued in the Middle Ages, in spite of legal definitions, especially during the Franconian epoch. In Roman law it is necessary to distinguish between the Republican procedure before *quaestiones perpetuae* and the administrative procedure which gradually superseded it under the Empire. In the former the principle of legality of offences was observed; in the latter, on the contrary, the judge had the power to punish *ad exemplum legis*—L. 7, par. 3, D. 48, 4—the power in this matter of the Emperor and of his officials being unlimited.

[15] Cf. Harris, *Principles and Practice of the Criminal Law*, 16th ed., 1936. It has been stated that to give an *ex post facto* operation to an enactment is not "hostile to the spirit of English law" (per Platt, B., in *Ex parte* Clinton, 1845, cited by Dr. Stallybrass in *Jour. Comp. Leg.*, 3rd Series, XIII, at p. 206), Willes, J., in *Phillips* v. *Eyre* (1870) gave as his opinion that a retrospective law was not contrary to natural justice. If a statute is designed to protect the public interest, the courts will attach great weight to that fact, and not improbably give it retrospective operation. Dr. Stallybrass emphasizes the fact that case-law works retrospectively. But in this peculiarity he sees the unfavourable activity of the case-law. "It is one of the disadvantages of case-law, that, since it declares the law which is and which was, its effect may be very inconveniently retrospective; and sometimes the legislator has to step in for the benefit of persons who are prejudicially affected by this retrospective operation." Stallybrass, *loc. cit.*, p. 207, citing Allen, *Law in the Making,*" 2nd ed., p. 275.

Be that as it may, one thing can be established without doubt: that both the practice as well as the doctrine in this country is contrary to the retrospective operation of criminal legislation.

In the judicial practice the analogical extension by interpretation of the field of criminal liability is cautious and carefully limited. In fact, the one exception which is made to-day, is that with regard to decisions upon indictments for conspiracy, considered as "odious in the law." When the Court of Criminal Appeal in *R.* v. *Manley* [1933], 1 K.B. 529, laid down that there is a "misdemeanor of committing an act tending to the public mischief," then a strong opposition arose against such a wide proposition. See further the article by Dr. Stallybrass, cf. *Jour. Comp. Leg., loc. cit.*, and Stephen, *Hist. Crim. Law*, Vol. III, pp. 359–360.

The attitude of the Japanese legislation to this question is also interesting. The Penal Code (" Keiho ") of August 12, 1880, admits the principle *nulla poena sine lege* in its Art. 2. The new Code (" Kaisei-Keiho "), on the contrary, no longer does so. We learn, however, that the only reason for this change is to be found in this fact that, meanwhile, *i.e.*, before the publication of this new Code, the principle in question was acknowledged by the constitutional law of 1899, section 23.[16]

More recently the Danish Penal Code[17] of April 15, 1930, in force since January 1, 1933, allows, in some measure, the use of analogy: " Only such an act can be subjected to the law the punishable character of which has been foreseen by the Danish legislation or such an act as is entirely assimilated to the above-mentioned act."

The Turkish Penal Code of 1858 did not accept the above-mentioned principle, which is understandable considering the special character of this legislation. But the new Penal Code of 1926, which is a translation from the Italian Penal Code of 1889, accepts it in its first paragraph.[18]

In Switzerland there are two cantons, Uri and Nidwalden, where there can be no question about this principle, because, up till now, in these cantons there are no written laws, but the law is based on custom.[19]

We must likewise draw attention to Soviet legislation, especially the Penal Code of January 1, 1927, which for comprehensible reasons, entirely rejected the principle. According to the 16th paragraph the judge can condemn by way of analogy every act on the ground of its being harmful to society and he can even take preventive measures, including such a radical measure as shooting (Art. 21).[20]

Two further enactments, which also do not admit the principle in question for special reasons, complete our enumeration. The first is the Code of the Canon Law (Corpus Iuris Canonici) of May 27, 1917. Heimberger demonstrated, referring to the fifth book of this Code, that in spite of the Canon 2219, section 3, the Code does not require that punishment should be based on law and that " the strict pedagogical tendency of the Church, which defends the salvation of the soul, is contrary to such a restriction."[21]

The same sacerdotal motive has not allowed this principle to be introduced into the legislation of Afghanistan. We learn from Beck's treatise that King Ammanulah's efforts to establish this western principle encountered decisive resistance from the orthodox priesthood of Islam ; the principle of legal punishment has been forced to yield to the ancient penal system of " Tazir," *i.e.* to discretionary penalties, defined by the judge in each concrete case.[22]

Finally, in order to be complete, we have to mention a certain tendency manifested in Germany.

It is well known that, since the national revolution of 1933, legislation, and especially penal legislation, has been entirely recast. The tendency of this legislative work has already been explained by the Prussian Minister of Justice, Hans Kerl, in his " commemorative writing " (*Denkschrift*),[23] which was a

[16] Cf. Kijuro Takeda, *Über den Satz, Nulla poena sine lege*, 1914, p. 23.

[17] Collection des Lois etrangères : II Code pénal danois, traduit par Schroll et des Gautries, 1935.

[18] Hippel *op. cit.*, I 428, II 24.

[19] Hippel *op. cit.*, I 386.

[20] Cf. Schwarzkopf, *Das Strafrecht Sowjet-Russlands*, 1929, p. 18.

[21] Heimberger, *Freiheit und Gebundenheit des Richters in weltlichem und kirchlichem Strafrecht*, 1928, p. 7.

[22] Cf. Beck, *Das Afghanische StGB. vom Jahre*, 1924 (*Die Welt des Islams. Zeitschrift der Deutschen Gesellschaft für Islamkunde*, 1924).

[23] Nationalsozialistisches *Strafrecht. Denkschrift des Preussischen Justizministers* (Decker's *Verlag*, Berlin).

preliminary scheme of the new Penal Code. We read (p. 127), that strict observation of the principle *nulla poena sine lege* is not reconcilable with the juridical sense of the nation in view of its harmfulness to social security. On this account it is proposed to complete the 2nd paragraph, section 2, of the German Penal Code by the following supplement:—

> " If in any case an act, which was not expressly deemed as punishable, is morally blameworthy, and if its punishment is justified by the juridical idea, which is the basis of the penal law in question, then the judge shall determine a punishment within the penal law, which will be applied by analogy."

This suggestion has been adopted by the law of June 28, 1935, in force since September 1, 1935. According to this law art. 2 of the German Penal Code of 1871 was amended as follows:—

> " Punishment will be inflicted on the person who commits an act considered by the law as punishable, or an act such as deserves a penalty, according to the fundamental idea of penal law, and to the sound sense of the nation. If no determinate penal law can be applied directly to such an act, its author will be punished according to that law, the fundamental idea of which most closely corresponds to the said act."[24]

Such, in brief, are the exceptions to the principle in question. They are explained by various reasons: the absence of written law and the consequent lack of legal definitions of offences and punishments, the primitive state of the legislation in the matter of political and religious development, and lastly, the policy of a ruthlessly despotic system of government.

We have now to examine, very briefly, the importance and the sphere of activity of the principle, in other words, its practical consequences.

The principle is that punishment may be inflicted only when the act in question is clearly considered by law to be punishable. It must therefore correspond to the statutory definition of the offence charged and must also satisfy the requirements of the general part of the Penal Code. The judge is thus deprived of all creative capacity in this sphere. He may never complete the penal law by introducing new crimes constituted by novel elements. In other words, he may inflict no punishment, whether principal or supplementary, except in the cases defined by law. The legislator alone can set down the elements of an offence, and he alone can establish punishments. It follows, further, that a penalty cannot be inflicted according to common law or by analogy. The underlying idea is that: the criminal law cannot originate from custom, that custom is never able to create new forms of an offence, and consequently, it cannot justify a punishment. Moreover, the argument from analogy has no application in the penal sphere, *i.e.* the judge can never fill the *lacunæ* of the law by defining as punishable acts which are not evidently determined by law. Those acts only which fall under a legal definition are and can be considered as punishable. In the case of a *lacuna,* the criminal judge must pronounce an acquittal, even when it would be to the advantage of society that the act in question should be punished. In other words, if the given act is not punishable under the penal law, the judge must acquit. On the other hand, seeing that the purpose of our principle is the good of the individual and his security, and to protect and assure his freedom from judicial discretion, it does not forbid the application of common or customary law and of analogy in penal questions where they are in favour of the accused, *i.e.* where there is a question of justification or of extenuation.

According to the opinion of the majority of theoretical criminalists of to-day, this point of view is considered right and opportune.

[24] *Official Journal,* I, p. 839, Art. 1.

We have already said that the principle, *nullum crimen sine lege,* is the fundamental basis of modern criminal legislation. How can this be explained? The answer is simple: it is inherent, the very nature and the essence of law, as a sovereign rule of harmonious social life and of well-ordered social relations, to seek to avoid punishment as an evil justifiable only by necessity.

The result is that the law should seek to prevent rather than to punish wrong-doing. Now, it is essential to the purpose of prevention that the law should express in terms comprehensible to all what acts it considers to be injurious to society, and consequently punishable. *The threat must precede the penalty.* Only on this condition can the evil inflicted by punishment be recognized to be necessary and is consequently justified.

At this point the question arises whether the results which we have mentioned as produced by our principle are advantageous to the administration of law and in the interest of justice, and if so, in what respects. The answer is that the principle, *nullum crimen sine lege,* serves the interests (1) of the individual, (2) of the State, and (3) of the society of States and of international co-operation.

Consideration of the advantage to the individual is almost superfluous. As is well known, Professor Liszt describes the principle, *nullum crimen sine lege,* as the " magna charta of the delinquent." This meaning of this definition is that the principle in question protects the criminal against undeserved punishment, *i.e.* those which have not been brought to his notice beforehand. However, this observation has been criticized on the ground that the task of laws is not to protect the interests of criminals, and moreover, the principle in question does not concern the criminal.[25] Be that as it may, it affords an important guarantee of individual rights. Whether our principle is, or need be, the " criminal's Magna Carta " may well be doubted, but it must be admitted to be the Magna Carta of the innocent, whom it protects against the discretion of the judge and arbitrary acts committed in the name of justice. It is the undeniable right of every man to know what acts are allowed and what forbidden, what acts the law considers useful, what harmful and what indifferent. In such matters surprise constitutes an obvious injustice and is irreconcilable with the psychological function of law especially. In our time, which, as a former German Minister of Justice stated, is a time of hypertrophy of laws and regulations of all sorts, to know even the written law is extremely difficult[26]—a fact which gives our principle all the more importance. The fundamental right of man: the freedom of the individual, would be, in fact, illusory, if we were to abolish the requirement that offences and punishments be determined by law. Nobody could be certain of the future. The modern doctrine of guilt has arrived at the conclusion that without knowledge of the illegality of an act there can be no guilt in committing it. In other words, the idea of guilt demands consciousness of illegality. Consequently, the old principle, *ignorantia iuris nocet,* is now considered erroneous. This doctrine, which has spread more and more into the general doctrine of criminal law, was acknowledged in Germany before the rebuilding of German law by the Hitler régime, by *communis opinio doctorum.*[27] Some years ago I endeavoured to prove that there is no possible justification for the principle, *ignorantia iuris nocet.* It is, in particular, irreconcilable with the principle, " no punishment without guilt," the acceptance of which is universal and uncontested.[28]

[25] Hippel *op. cit.*, II, p. 36 and p. 44.

[26] Cf. Schiffer, *Die Deutsche Justiz,* 1928, 80.

[27] This is a point of view represented especially by Binding, Beling, Allfeld, Oetker, Heimberger, Hafter, Mezger, Gleispach, Kadecka, Eb. Schmidt. Other writers, as for example Frank, M. E. Mayer, Hippel, would acknowledge dolus (*mens rea*—malice) only on condition that at least the ignorance of law results from imprudence or negligence (simple fault—*culpa*). Cf. also Rittler *op. cit.*, 137, 143; Mezger *op. cit.*, 331, 333.

Since there can be no question of guilt, and therefore of a punishable act, without consciousness of illegality, it is impossible to pronounce an act to be criminal unless all the elements which constitute its criminality have been laid down by the legislator before the commission of the act. This conclusion is simple logic and conforms with the intuitions of justice.

Besides the interest of the individual, the principle, *nullum crimen sine lege,* serves also the interests of the State and of justice. As is well known, the theory of the exclusive and unlimited power of the State has long been abandoned, and we need not mention here the exceptions which have appeared recently. Under the influence of the American Declarations and of the French Declaration, public law became gradually more and more democratic ; the individual, considered as endowed with indestructible rights, has been set against the State, and monarchical sovereignty has been replaced by the sovereignty of the nation. The individual can be no longer considered as an instrument used for purposes which are beyond himself, therefore he cannot be sacrificed to the public interest. This point of view would itself, perhaps, be considered by some as already obsolete ; nevertheless it conforms not only to public opinion and to the fundamental idea of Christianity, but also to the majority of the governmental systems. Therefore, according to this point of view, the main task of the juridical policy of the State is to guarantee a necessary sphere of individual liberty, and at the same time to impress on the consciousness of the individual the ideas of security of law, of equality before the law and of the stability of justice. It must be so, because such a conviction is a necessary psychological condition of a well-ordered public life, and is also a fundamental basis of a really legal and democratic power. The principle, *nullum crimen sine lege,* is an essential source of such a conviction : and for this reason a democratic State cannot in its own interest dispense with the principle. It is an old and proved truth that one can keep the people in obedience only when orders are clear and intelligible. The function of the administration of justice, likewise, can be efficient and opportune only when it has a stable foundation, exempt from every fluctuation, and without oscillation, which in this sphere is pernicious. The principle of legality of offences and of punishments alone can afford such a foundation. And lastly, we have also to take into consideration advantages which follow from the stability and uniformity of jurisprudence for both the State and for justice, advantages which can be obtained only on the basis of a law which never opens its doors to originality and inventiveness in the judge. These are truths which can neither be denied nor forgotten by one who thinks objectively, and not of extraneous aims and considerations.

We stated lastly that the principle, *nullum crimen sine lege,* can render good service to common international interests and to international co-operation. Anyone can understand that mutual acknowledgment of laws and mutual confidence in this acknowledgment may settle and considerably ease international relations. The one as well as the other require written law, that is, that the power of defining punishable acts should be confined to the legislator and not to the judge. It is well known that recently the work of unifying the criminal laws of various countries has made considerable advances. Several congresses about this matter have been held, of which the guiding principle has been the ideal of international solidarity.[29] It seems superfluous to explain further than this that this particular tendency can be realized only by a strict observation

[28] See Glaser, *Ignorantia iuris dans le Droit pénal, Revue de Droit pénal et de Criminologie, Févr,* 1931.

[29] Cf. Pella, *Vers l'Unification du Droit pénal par la création d'un Institut international auprès de la Société des Nations, Etudes Criminologiques,* 1928, II, 49. Aussi Rappaport, *Le problème de l'unification internationale du Droit pénal, Revue Pénitentiaire de Pologne,* 1929, IV, 86.

of the principle in question. The condition of every convention in this matter is unquestionably the rule of the principle, *nullum crimen sine lege.*

We have given a brief review of the motives telling in favour of the maintenance of our principle. But the question may arise whether perhaps it would be expedient, in order to satisfy practical needs, to admit some qualification of our principle?

It is well known that contemporary legislation in various countries and a novel theory have already considerably attenuated our principle. It is sufficient to recall the discretion given to judges to modify the punishment laid down by law, within maximum and minimum limits, to give weight to extenuating or aggravating circumstances by substituting one punishment for another, to adjourn the execution of a sentence when it is pronounced, to shorten the duration of one already pronounced, or to grant conditional release, etc.

Moreover, within the limits described by the law, he can, as a matter of grace, refrain from condemnation even when guilt has been stated ; he can, in fact, pardon. Further attenuations of our principle appear also in the legal definitions of offences, especially in the description of their constitutive elements. The legislator no longer operates in terms of precisely defined acts, but uses terms and conceptions of valuations, which the Germans call *" normative- oder Wertbegriffe,"* the significance of which is left to the judge's conscience. We refer to such expressions as: artfully, insidiously, astutely, fraudulently, maliciously, spitefully, against the public interest, brutally, negligently, against social morality, against decency, from low motives, in a state of great irritation justified by the circumstances. Lastly, we must recall here the theories of individualization of punishment and of indeterminate sentences, and the account to be taken of a dangerous state of the author of an offence, after the committing of it (following the offence), and even of a dangerous state of a man before the commission of any offence, etc.

These may seem to be important qualifications of our principle, and one must not only reckon with, but perhaps even approve, their tendency, assuming that their aim is the individualization of punishment and the protection from deformation of justice and the very idea of law. They do indeed meet certain practical necessities. But to exaggerate their application is neither desirable nor expedient. It would be very dangerous to civic liberty and individual security to abandon legality in the treatment of crime. In particular, it seems undesirable to proceed further and to admit the states and the circumstances " beyond the law," especially to bring into the theory of guilt the idea of imputability (*Zumutbarkeit*) and to apply in the theory of the law of necessity (or state of necessity) the principle of estimation of goods and obligations—a theory adopted recently (*i.e.* before the rebuilding of the law by Hitler's régime) in German doctrine and even in German jurisprudence. Still less can we approve the modern method which seeks to allow full liberty of interpretation, and especially to authorize, if necessary, the extension of repressive regulations (*i.e.* those which determine offences and punishments). Jurisprudence, accomplishing pretorian work, to use Vidal-Magnol's phrase, has been inspired by this tendency, and it has been observable that judgments often have not been imbued by the text or even by the spirit of the law, when it was a question of defending some important social interest. The same authors emphasize, and they are right, that it is difficult to see progress in this tendency, because it is only a return, perhaps an unconscious one, to the system of discretionary punishments, so dangerous to the liberty of the individual.

The supposition is warranted that all attacks against the principle, *nullum crimen sine lege,* are inspired by political motives and aims. We cannot refrain from quoting the words of an eminent German scientist, Berner, about this

matter. "Only despotism," he said, "would wish to abolish the principle, *nullum crimen sine lege.*"[30]

Indeed, we can observe during the historic evolution of this question a complete dependence of our principle upon governmental system and governmental tendency. During the centuries of absolutism, especially during the XVIth and XVIIth centuries, and also well into the XVIIIth century, when the liberty of the individual was entirely precarious, the discretion of the judge in the matter of crime and punishment prevailed over the law. They were no longer limited by the law. The judge could extend criminality *per analogiam*, he could also apply so-called "extraordinary punishments." The period which began in the XVIIIth century elevated the idea of the individual autonomy of a free man, and, at the same time, in this same period the absolute power of the judge has been replaced by the absolute power of the law. From this period comes the well-known saying of Montesquieu: ". . . that the judges of the nation are only . . . the mouth which pronounces the words of the law, they are only inanimate beings who can neither moderate its force nor its rigour."[31]

It was forbidden not only to interpret the law but even to comment on it. Hence it was this epoch that formulated the principle, *nullum crimen sine lege.* And later, in the XIXth century, when liberal individualism gave way to Socialism, the attempt was made once more to replace the absolute power of the law by that of the judge.[32] Hence come the criticisms and assault which have been launched against our principle. One more characteristic and significant fact must be mentioned. In proportion as despotism replaced the absolute power of the law by that of the judge, it was able also—and here is the paradoxical phenomenon—to destroy the independence of the judge and subject him to governmental power. This was because it was desired to transform him into a submissive instrument for the furtherance of political policy. Since the judge is no longer limited by law, he is above the law: he can ignore the law, he can also create new forms of offences or criminality and apply sanctions to them. But, on the other hand, the guarantees of his independence have been at the same time abolished. In this way the following situation was created: the judge, being over the law, was no longer submitted to it; being no longer irremovable, he was submitted to the administrative power. Consequently, he was inclined to make use of justice in furtherance of governmental needs and desires; he was disposed to cover up abuses of authority by the semblance of law and of justice, he was also disposed to oppress in a ruthless manner all those who have and who desired to keep their own opinion, which was prompted by their conscience and not by the political tendencies of the government.

Here is the reality stripped of all hypocrisy and of all appearances which are used to cover up the real truth. Here are also the real reasons of the attacks against the principle, *nullum crimen sine lege.* But the cause of its existence is clear and unquestionable for all those who understand the real sense, the importance and the imperishable value of the autonomy and liberty of the individual—who understand that it is not only the law of man's nature, but also a fundamental condition of all progress and of all victories of Christian culture. That is why the eminent German criminologist, Reinhard Frank, was absolutely right in declaring that the principle, *nullum crimen sine lege,* "appears to-day as an integral part of our conscience of penal justice, universally acknowledged in international relations." It is, indeed, also a powerful barrier against tendencies towards abuse of justice. It is unquestionably one of the most important safeguards against the worst of all oppressions—that oppression which hides itself under the mask of justice.

[30] Cf. Berner, *Lehrbuch des deutschen Strafrechts,* 18th ed., 1898, 251.
[31] Cf. Montesquieu, *De l'esprit des lois,* livre XI, chapter VI.
[32] Cf. Rittler, *Freiheit und Gebundenheit des Richters,* etc., 40.

THE PRIORITY OF MARITIME LIENS.

[*Contributed by* GRIFFITH PRICE, ESQ., M.A., LL.D.]

THE priority of maritime liens is a question of the greatest interest, particularly when the enquiry takes the form of a comparative study of the subject. In this country the courts have had to face certain difficulties, and the law relating to priorities cannot be regarded as definitely settled. In the United States also many difficult problems of ranking have been presented to the courts for decision. It will be interesting to consider from a general point of view what rules have been followed in dealing with these matters. Some attention may also be given to the attempt to unify the law of maritime liens by the Brussels International Convention, 1926.

The Priority of Maritime Liens and Other Claims.—Taking first the priority of maritime liens in relation to other liens and claims we may note that the former are regarded as privileged in general ranking before all other claims. The basis of this preferential treatment is found in United States law in the conception of the maritime lien as a claim *in rem* or against the vessel itself, regardless of questions of ownership. From the nature of the case, it is said, maritime liens override other claims, such as mortgages and possessory liens, which attach only to the personal interest of the owner.[1] By way of contrast, the priority of the maritime lien in English law, where it is likewise a claim *in rem,* is to be explained by reasons of a more general character. A maritime lien naturally has priority over a mortgage of the vessel, for in the case of a mortgage the owner's rights of property are transferred to the mortgagee, while the owner is left in possession of the ship, with liberty to subject her to new ventures. Again, a maritime lien accrues from the moment when the claim attaches and, therefore, ranks before all statutory rights *in rem,* such as necessaries supplied to a ship, for these are effective only from the time of the institution of the suit. So, too, possessory liens rank after maritime liens that have already accrued, since the holder of a possessory lien takes the vessel subject to existing encumbrances, it being the general policy of the law to subordinate later claims to earlier ones, in accordance with the maxim, *qui prior est tempore, potior est jure.* In the Continental codes maritime liens are given priority over mortgages and all other liens and claims, probably for reasons of maritime interest and commerce.

The Priority of Maritime Liens *inter se.*—The larger question now arises as to the priority of maritime liens *inter se,* or in relation to one another. Priority problems have exercised the English and American courts for over a hundred years. In England much uncertainty has existed in regard to the subject, while it is not too much to say that in the United States the position has been one of great confusion. The present discussion may best assume the form of an attempt to state the general rules that have been followed in dealing with the ranking of maritime liens. The priority of competing liens can, of course, become important only when the fund representing the res is not sufficient to satisfy all the claims. Should the fund available be distributed *pro rata* among all the creditors? There is some evidence that this was done at an earlier period, but such a course has not latterly been followed by the Admiralty Courts, certain claims being granted priority over others as a result of various considerations. There appear to be two general modes of classification, priorities according to the time of accrual and priorities according to the character of the lien.

The Time of Accrual.—Both in English and in American law the rule of the inverse order of attachment has generally been accepted. That is to say, liens attaching subsequently are usually preferred to those attaching earlier in time. It should be observed that this is in no sense a rule of laches, but a principle of ranking. It is in striking contrast to the well-known rule of the common law—*qui prior est tempore, potier est jure.* The rule of the inverse order is probably derived in part from the practice of the civil law where the later of two creditors

[1] *The Guiding Star* (1883), 18 F. 263 (C.C. Ohio).

who advanced money on the res was preferred to the earlier on the ground that he had preserved the common security.[2] In England it has recently been held by a learned judge that the decisions of the Admiralty Court do not support quite so wide a statement as a definite rule of the inverse order of attachment, but that they only show that the principle has been applied in certain cases.[3] However this may be, the inverse order has certainly been accepted in this country as an Admiralty doctrine for many years, and in the United States it has even been held that, generally speaking, the law of maritime priorities is made up of exceptions to the rule of the inverse order.[4] Moreover, the principle rests upon a substantial basis of reason pertaining to maritime interest and commerce. In England it has generally been thought that the last attaching claim should be preferred to earlier ones on the ground that it has preserved the res for the common benefit of all the earlier creditors. This is no doubt the main reason put forward, but a further argument may be found in the conception of the lien-holder as an adventurer who holds subject to the chances of the voyage, though such a notion applies more especially to subsequent liens for damage.

The basis of the inverse order is stated somewhat more broadly in the United States. There the latest service performed is held to contribute not merely to the preservation of the res, for this *stricto sensu* could apply only to salvage services, but rather to keeping the vessel on her course as an instrument of navigation and commerce.[5] Such a theory appears to provide a perfectly sound reason for ranking all contractual claims in the inverse order of attachment, but the argument is perhaps not quite so forcible at the present day as it was prior to the development of communication by cable and radio. Another reason for applying the inverse order may be found in the consideration that each successive service increases the value of the res, and should therefore be preferred *pro tanto* to earlier claims.

These reasons, however, can in general apply only to subsequent claims arising *ex contractu* and can afford no ground for preferring later tort liens and collisions. It is here that the proprietary theory of maritime liens calls for examination. According to this theory the maritime lien is by nature not a hypothecation but a proprietary right in the res, the holder of the lien becoming, so to speak, a part-owner of the vessel. This doctrine was clearly enunciated in *The Bold Buccleugh,*[6] where Sir John Jervis, delivering judgment for the Privy Council and citing with approval the decision of Dr. Lushington in *The Aline,*[7] said: "In that case there was a bottomry bond before and after the collision, and the court held that the claim for damage in a proceeding in rem must be preferred to the first bondholder, but was not entitled against the second bondholder to the increased value of the vessel by reason of the repairs effected at his cost. The interest of the first bondholder taking effect from the period when his lien first attached, he was, so to speak, a part-owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that rate for the injury done, without reference to his claim. So, by the collision, the interest of the claimant attached, and dating from that event, the ship in which he was interested having been repaired, was put in bottomry by the master acting for all parties, and he would be bound by that transaction. This rule, which is simple and intelligible, is in our opinion applicable to all cases."

The proprietary theory as set forth in *The Bold Buccleugh* has not, however, been adopted by the English Admiralty Court as a guide to priorities, and it is submitted that there is some confusion of thought on the subject to be found

[2] *Dig.* 20, 4, 5; 20, 4, 6.
[3] *The Mons* (1932) P. 109, Langton, J.
[4] *The William Leishear* (1927), A.M.C. 1770; 21 F. (2d) 862 (D. Md.).
[5] *The St. Jago de Cuba* (1824), 22 U.S. (9 Wheat.) 409.
[6] (1851) 7 Moo. P.C. 267.
[7] (1839) 1 W. Rob. 111.

in the treatise by Maclachlan on *Merchant Shipping*. In his final chapter on competing liens and claims the learned author states that the prior claimant shares in the later benefit conferred on the common subject of their liens, and that *therefore* each person becomes by his right of lien so to speak a part-owner in interest.[8] But the rule of the inverse order, so far as it has been followed in this country, proceeds from the conception of the preservation of the res by the latest services rendered, not from the doctrine of the maritime lien as a right of property in the res so as to embrace all liens both *ex contractu* and *ex delicto* from whatever source arising.

The proprietary theory in its relation to priorities has also been applied by the Supreme Court of the United States. In *The John G. Stevens*[9] a maritime lien for collision was held to rank before an earlier maritime lien for supplies, the court saying: "All the interests, existing at the time of the collision, in the offending vessel, whether by way of part-ownership, of mortgage, of bottomry bond, or of other maritime lien for repairs or supplies, arising out of the contract with the owners or agents of the vessel, are parts of the vessel itself and as such are bound by and responsible for her wrongful acts. Anyone who had furnished necessary supplies to the vessel before the collision, and had thereby acquired under our law a maritime lien or privilege in the vessel herself, was, as was said in *The Bold Buccleugh,* before cited, of the holder of an earlier bottomry bond under the law of England, so to speak, a part-owner in interest at the date of the collision, and the ship in which he and others were interested was liable to its value at that date for the injury alone, without reference to his claim."

The John G. Stevens only decided that a lien for damage caused by a collision was preferred to a lien for supplies furnished before the collision, but it is clear that the proprietary theory upon which the decision is based applies equally to liens *ex contractu* and liens *ex delicto,* so that a lien for collision, being a property right in the vessel, would be outranked by a later lien for supplies. The theory has not generally been followed by the lower courts of the United States in dealing with priorities, but such a rule would certainly possess the advantage of simplicity and certainty and the doctrine of part-ownership accords well with the essential nature of the maritime lien as a claim which travels with the ship regardless of notice. Indeed, the adoption of the theory might go far towards providing a complete solution of all problems arising out of maritime priorities.[10] On the other hand, the rule of the inverse order, which thus finds a basis in the property theory, is not in accordance with the doctrines of the common law, and it has been suggested that, if such a complete alteration of the law is to be made, the rule of the direct order of attachment should be generally applied.[11] It is submitted, however, that, of the two solutions proposed, the adoption of the inverse order in its entirety rests upon a surer foundation of practical interest and is more likely to do justice to the various parties concerned.

In the Continental codes the order of claims is generally fixed, and the rule of the inverse order is only very partially applied. In the French Code of Commerce the order of claims is absolutely fixed according to the character of the lien. In the Italian Maritime Code the order of ranking is also fixed, but the inverse order is applied to some extent. Thus claims of the same rank share equally when they arise in the same port, but if such claims arise in other ports, even during the same voyage, subsequent claims are preferred to those of earlier date. In Germany there is a fixed order where all the claims relate to the same voyage, but, where there are several voyages, claims relating to the last voyage rank before claims arising during earlier voyages. It should be

[8] Citing *The Bold Buccleugh.* [9] (1898) 170 U.S. 113.

[10] This view coincides with that stated by Beach, J., in *Relative Prioirty of Maritime Liens,* 33 Yale L.J., 1924, p. 845.

[11] Willard, *Priorities Among Maritime Liens,* 16 Cornell L.Q., 1931, p. 523.

noted that the " voyage rule " is also applied in the United States, for liens of an earlier voyage are outranked by liens of the same class arising on a later voyage. In English law no distinction is made in regard to voyages.

The Character of the Lien.—Both in England and in the United States it has been stated that liens *ex delicto* rank before liens *ex contractu,* but in neither country has such a rule ever definitely been established, for in general it is a *subsequent* tort lien that has been preferred to a contract lien in accordance with the principle of the inverse order. In favour of the priority of a lien *ex delicto* over a lien *ex contractu* it has been urged (1) that the former should be preferred on account of its involuntary origin, and (2) that it should be preferred for reasons of justice and equity—*laesus ante omnia restituendus.* But whatever the arguments for the priority of the tort lien, it has recently been laid down in England that all liens are equal and co-ordinate.[12] Such a rule, of course, has the advantage of simplicity and uniformity. It may be remarked, however, that in this country seamen's wages have been allowed to rank before master's wages and disbursements, wages have been preferred to later bottomry, and life salvage is by statute payable in priority to all other claims for salvage. An inherent merit does, therefore, appear to have been recognized in certain classes of claims, entitling them to preference in the scale of priorities, and such recognition would seem to be more consonant with principles of justice.

In the United States the Courts have recognized certain claims as possessing an inherent merit in relation to others. By the weight of authority maritime liens rank, irrespective of the time when they attach, in the following order[13]: (1) seamen's wages ; (2) salvage ; (3) tort and collision liens ; (4) repairs, supplies, towage, wharfage, pilotage, and other necessaries ; (5) bottomry.

In the Continental codes priorities are largely fixed according to the nature of the liens, but the order varies in different countries, the most striking feature of the codes being the absence of a maritime lien for collision damage or, where such a lien exists, the low order of ranking assigned to it. In English and American law priorities appear to depend upon a mixture of theories or considerations and, though some complications may result, they may be said to avoid a certain element of arbitrariness and perhaps injustice to be found in the various foreign codes.

The International Convention.—An attempt was made by the Brussels International Convention, 1926, to effect a unification of the diverse national laws relating to maritime liens and mortgages. Inasmuch as maritime liens, which are largely secret in their operation, have priority over mortgages, it was also sought to raise the status of the latter by limiting the number of liens allowed to rank before the mortgage. At the same time the priority of such liens was determined and, by Article 2 of the Convention, they were given the following order of ranking:—

(1) Law costs, State fees, and expenses of preservation and sale ; tonnage, light, dock and harbour dues and similar public charges ; pilotage and watching and preserving the vessel in the last port.
(2) Claims arising under the contract of service of the master, crew, or other persons serving on board.
(3) Salvage and general average.
(4) Collisions or other accidents of navigation ; damage to harbour works, docks and navigable waterways ; personal injury to passengers or crew ; and loss of or damage to cargo or passengers' baggage.
(5) Master's disbursements and repairs and supplies to the vessel.

Signatories are free to retain or create other liens, but such liens are postponed to the mortgage and the liens having priority over the mortgage. Under

[12] *The Stream Fisher* (1927), P. 73, Bateson, J.

[13] *The William Leishear* (1927), A.M.C. 1770 ; 21 F. (2d) 862 (D. Md.).

the Convention, therefore, mortgages satisfying the conditions laid down become a species of maritime liens, resembling the preferred ship mortgages established by the American Merchant Marine Act, 1920.[14]

It is provided by Article 5 of the Convention that liens attaching on the same voyage shall rank in the order set out in Article 2 above. Claims included under any one heading share equally and *pro rata* where the fund is insufficient to pay the claims in full. Claims mentioned under Nos. 3 and 5 in that Article, however, rank inversely to the order of time in which they arose. Claims arising from one and the same occurrence are deemed to have originated at the same time. Article 6 provides that claims secured by a lien and attaching to the last voyage shall have priority over those attached to previous voyages ; provided that claims under one and the same contract of service extending over several voyages shall all rank with claims attaching to the last voyage.

The Convention has been adopted, or its principles have been put into operation, by several States, including Belgium, Holland, Greece, Italy, France, Sweden and China. On the other hand, it has not been adopted by Great Britain, Germany, and the United States. In England there is said to be some difficulty in reducing the provisions of the Convention to statutory form owing to the complexity of the English law and the absence of any existing statute law on maritime liens, but it is also stated that Parliament would not have had time to consider the necessary Bills, even if they had been drafted. Further, the provisions of the Convention seem more favourable to merchants than shipowners when compared with the existing English law, but British shipowners have nevertheless taken the long view that, since the Convention forms part of a series of Conventions aiming at international unification, the British Government should honour the signatures of its representatives at Brussels by giving legislative effect to the Convention. Shipowners have strongly pressed this view upon the Government and hold them to their pledge of ratification both as regards the Convention on Liens and Mortgages and that on Limitation of Shipowners' Liability, and they point out that if countries choose to ratify only those Conventions that are of greatest interest to them no real progress can be made in the field of international unification.

GOVERNMENTS AND FILMS.

[*Contributed by* Oliver Bell, Esq., *Director of the British Film Institute.*]

During the last forty years the cinematograph has become a great new factor in the life of almost every country in the world. The average attendance at the theatres is measured in many hundreds of millions a month and even in our own land it is reckoned that between 20 and 23 million people pay each week an average price of just under one shilling for admission to one or other of the 4,500 theatres scattered about the country.

Though some people confess to going to " the pictures " several times a week and others' visits are as rare as once a year, the vast majority of patrons go once a week. There are some indications that faint efforts are made to pick and choose one's fare, but most people still are chiefly influenced by the title, the name of the star, the pictures in the foyer or the " trailer " which they saw the week before advertising " Forthcoming Attractions." For their shilling they get a comfortable seat, warmth, three hours' entertainment with two full-length or feature films, a news reel, a Ministry of Information 5-minute film and perhaps a short interest picture thrown in. Being in the dark and looking at a brilliantly-lit screen, their critical faculties are dulled, and in a semi-hypnotized condition they escape from the world of reality into one where, no matter what adventures or tragedies

[14] 46 U.S. Code 911 ff.

befall the hero or heroine, and how many tears are shed during the course of the performance, all comes right in the end—as in the penny novelette on which the plot is modelled.

Escape is the dominant motive of attendance. In the case of the adolescent this is also mixed with the possibility of being alone with his sweetheart and not having to roam the streets or sit with the family. Because it is cheap the film is essentially a form of " mass " entertainment and the films have to be made to cater for the masses' tastes. Because, too, with increasing years come other responsibilities and interests and three consecutive hours are hard to find, the age range of the cinema theatre patron is from 17–25, with, on Saturday afternoons and holidays, a sprinkling of parents and their children. These last also attend the cinema alone as often as money can be begged to buy a ticket or as often as some passing adult can be persuaded to take them in as their " guardian." It is for these types of mind that the industry makes its films and not for the far smaller stratum of people who have received a secondary or higher education.

The Power of the Film.—People of this latter type are disappointed on the few occasions that they are dragged to the cinema and proclaim quite truly that all this is sub-adult entertainment and, therefore, beneath contempt. In passing it by in this manner, however, they are making a mistake, for they are ignoring a medium whose possibilities rank with the printing press and considerably higher than the wireless as a means of imparting information. Whether we like it or not, every film shown on the screen is having some effect on the audience. It may be no more than increasing their knowledge of other parts of the world. Most cinema-goers, for example, know something of what tropical scenery is like. This they have gleaned in part from travel films or news reels. The glimpses in these, if not the whole truth, were at least accurate so far as they went. In part, too, they have gathered their knowledge from, perhaps, Miss Lamour's films, where, inside a studio, were constructed sets of " tropical scenery." These may have been based on fact, but a large amount of dramatic licence was also employed. These sets are more arresting than the real thing, and the audiences go away with a false impression.

In addition to this pseudo-geographical or historical knowledge, cinema audiences also gather ideas on behaviour. Evidence from the girls' clubs in this country shows very clearly how their members are affected in such things as styles of hair-dressing or clothing and in deportment. I have also seen occasions in a West End police court where the behaviour of the accused seemed to me to reflect faintly but obviously the behaviour of people who find themselves in a similar position in an American film. To the unsophisticated adolescent, whose experience of the world is infinitely less than his assumed knowledge, the glamorous conventions of Hollywood production may give such false impressions as to prepare the ground for totally unexpected social repercussions: or, what is infinitely more dangerous, subversive political ideas can be subtly suggested and absorbed.

Considerations such as these are the root of censorship. The chapters dealing with this subject in Professor Harley's new book[1] make interesting reading. Naturally, he is able to give a clearer picture of the official and unofficial agencies at work in his own country, but the 100 pages devoted in Chapter V to " Around the world with the Censors " are an invaluable compilation of facts. It seems that whether through an official Censorship Board, or, as in Great Britain, through the unofficial British Board of Film Censors, all countries retain the right to ban whole films or have scenes deleted from them. The subjects with which the censors deal are either of a moral (immorality ; inciting to violence ; brutality) character or come under the head of politics, or, as some call it, " National

[1] *World-wide Influences of the Cinema* : A study of official censorship and the international cultural aspects of motion pictures. By John Eugene Harley. Cinematograph Series No. 2. (Los Angeles : The University of Southern California Press, 1940.) 320 pp.

Dignity." The attitude towards moral matters is easy to understand, but the differences between censors' habits are never more clearly shown than when political considerations are involved.

Censorship for Political Reasons.—It is reported that even Mickey Mouse has his troubles, for he was thrown out of Yugoslavia because of his revolutionary and Communist designs and out of Russia for showing the meekness and mildness of the masses under capitalism. *A propos* of this the following quotation from Mr. Sam Goldwyn, the producer and owner of Metro-Goldwyn-Mayer, is interesting as showing his point of view.

> Sinclair Lewis's book, *It Can't Happen Here,* was shelved. It might offend nations governed by dictators. Mexico raged furiously against Hollywood cowboy pictures which always made the villain a Mexican. Certain Balkan countries objected to their countrymen being portrayed as spies. The Chinese Government has raised protests against the constant showing of their nationals as back-country bandits with long, drooping moustaches. Hollywood watches this carefully. It has got so lately that the only people who do not object to being ridiculed are the Americans. In fact, the only villain we dare show to-day is a white American, over 21 years of age, and with a completely fictitious name that no one anywhere, can claim is his.

The political censorship seems to be an attempt by individual nations to preserve their own culture, sometimes against new political views, and sometimes against what Professor Harley calls " excessive Americanization." It is a fact that the virtual monopoly of cheap entertainment is vested in less than a dozen great Hollywood companies whose total output is some 600 films a year. Each of these is seen by some 100,000,000 people, a figure that compares very favourably with the million copies bought of a very good best seller or the 100,000 who see a highly-successful play.

In connexion with political censorship Professor Harley calls attention to a series of bilateral treaties that have been concluded, and cites as typical one between Spain and San Salvador, published in the League of Nations Treaty Series, 1935. By the terms of this the two parties agree:—

> To prohibit the trade in and the circulation and exhibition in both countries of cinematograph films or reels, whether sound or silent, produced by any process whatsoever, which attack, slander, defame, ridicule, insult, or misrepresent directly or indirectly, the uses and customs, institutions, habits, characteristics or peculiarities of or incidents occurring in Spain and Salvador.

As neither country is a producer of films it would appear that the most that this Treaty can do is to limit the film supply of their own nationals, since their market is too small to have any appreciable effect on the film makers. On the other hand, should such an Article be inserted in a general international convention, it might be more than a pious expression of opinion and materially affect the general type of films supplied. These are now governed strictly by the ordinary commercial law of supply and demand, which knows no other considerations than those of profit.

Censorship, however, I am inclined to believe, must remain essentially a purely national function, to be applied in the light of domestic issues. Whether it must have an official or an unofficial basis does not matter. Provided that in the case of our country, for example, Parliament is satisfied with the conduct of the unofficial censorship agency, there would appear to be no need of further action. Only should the reverse be the case can we envisage the appointment of an official film censor such as exists in some members of the British Commonwealth and in some of the colonial dependencies such as Malaya. Should it ever

come about, probably those who shouted loudest against the British Board of Film Censors would be the first to regret the stereotyped attitude of the official censor unable to change with the shifts of public opinion.

Quota Acts.—In addition to censorship and its use as a small and rather ineffective weapon against the overlaying of national habits by those of the country producing the film, countries with a film industry of their own have resorted to the weapon of the quota. The memory of the effects of the British Act of 1928 and the way that, instead of raising the standards of British-made films, it called forth the incredible " quota-quickie," will be fresh in the minds of those who have had anything to do with films in recent years. An effort to stop the loopholes was made in the Act of 1938, whose operation has recently had to be modified owing to the difficulty in war conditions of getting a sufficient supply of British-made films. The indications were that even this fresh Act was not succeeding in its purpose of maintaining a first-class home industry in face of American competition. New loopholes had been found and so, though our industry continued in being, it was not developing in importance.

The Germans tackled the problem as thoroughly as is their wont. The Nazi Government recognized from the start the importance of the film for the dissemination of ideas. They took over the German film industry on coming into power. They made full-length feature films with a propaganda twist. As a result, to all intents Germany had become self-sufficient as to film supply a year before the war started. Since then the Nazis have taken over the cinema industry in all the occupied countries and have forced them to make and distribute either films satisfactory to the Nazi point of view or German-made films. The avowed Nazi policy is so to organize the European film industry as to create a market of sufficient size and value to be able to break the U.S. monopoly after the war, no matter who wins or loses.

Before they had built up their own industry and the German market was still sufficiently valuable to be a considerable factor in film finance, the German censors had reserved the right to bar all films of a producing company that circulated films in other countries which the Germans considered to be harmful to Germany or likely to affect her good relations with them. The result of this was that Germany prevented anti-Nazi films being made for several years after 1933. Since the war Germany has used diplomatic channels to prevent Allied or U.S. anti-Nazi films being shown in neutral countries on the ground that it was incompatible with strict neutrality to allow them to be exhibited. Allied diplomatists do not seem to have invoked similar arguments to prevent the showing of German products.

Italy, Russia and Japan.—The other dictatorship countries have gone some of the distance along the road that Germany has travelled. Italy, for instance, takes strong action against any scene in a film which may in any way be construed as derogatory to the régime or sympathetic to other forms of political theory. For Marie Waleska, for example, a large section was cut because Napoleon was made to express himself in favour of a United States of Europe based on democracy. Wherever the British flag was shown in the " Mutiny on the Bounty " it was ordered to be cut, as were the British coronation scenes from " The Girl from Scotland Yard."

On the other hand, the Italians have had to admit more foreign films than Germany, for their home market is so small that it cannot support an economic production industry without an extensive export trade. This, unlike the French, the Italians have never achieved. In 1938, moreover, she quarrelled with the U.S. over currency restrictions, barred the entry of all American films and has had to depend more and more on the senior partner in the Axis for the film entertainment of her people.

In Russia the whole film industry is closely controlled by the Government through Sovkino and few foreign films are admitted. Export attempts ended some years ago when the aggressive tactics of Russian foreign policy came to an end. No further effort has since been made to get their films into other countries for propaganda purposes.

In Japan the moral censorship is naturally far stricter than in other countries because of the differences in conventional standards. Very common cuts are scenes of kissing, undressing, and " immoral " dancing. The censors are very sensitive to references to royalty, and in " Fire over England " was cut in its entirety the scene where Elizabeth slaps her maid for impertinence. Films which could be considered as political have also been heavily censored until recently ; since when German films have had almost a free entrée.

From our evidence, therefore, it is clear that a moral censorship is applied in all countries to films equally with all other forms of public entertainment. In all consuming countries a further censorship is applied to the political ideas latent in the film. This ranges from France, where it is almost non-existent, to Great Britain, where it takes the form of extreme sensitiveness to religious topics, or anything which seems to imply cruelty to animals, and at one period to anything that savoured of Communist propaganda ; and so on an ascending scale to Germany, where the political censorship is used instead of a quota law to build up a home production industry.

Trade Follows the Film.—Most countries which have a home production industry have tried to stem American competition by the imposition of quota laws. At the same time they have tried to build up an export trade as they recognize the film's economic as well as its propaganda value. Some countries deliberately try to export ideas. Others do so unconsciously. Others, like the U.S.A., as is shown by extensive quotations in Professor Harley's book, look to the film to increase their export trade. Mr. Walter Wanger is cited as writing:—

> Trade follows the film. American automobile sales increase when foreign communities see some favourite American star riding around in an attractive new model car. Back in the silent feature days a wholesale appliance house in Athens cabled for thirty barber's chairs " like the one in the picture." The stimulus has sometimes almost a revolutionary result. A strike of Paris stenographers once was laid to the influence of films which showed how much better equipment, sanitation, light and air were enjoyed as a matter of course by office workers in U.S.

Another writer states:—

> An American manufacturer of sewing machines was astonished to receive a sudden flow of orders from Java and Sumatra, where he had no agents. Investigation disclosed that the natives had seen a film which showed women sewing on his machines. Hence the orders.

There can be no doubt that the film has international implications in that it can introduce influences from outside the national jurisdiction which can profoundly disturb the thoughts and habits of the national community, and even the national economy. All countries recognize this fact. They counter it first by the negative force of a censorship controlled directly or indirectly by the Government ; second by building a home industry under the shelter of some legislative device like a quota ; and lastly, in ever-increasing measure by making the national system of education take account of this profound new influence which is affecting the minds of their children from their earliest years. By this means they hope to develop a sense of critical appraisal of what is shown on the screen and so render the nation less susceptible to screen influences.

Pre-War International Effort.—In the international field some attempts were made to grapple with films through the League of Nations and its associated organs. The Child Welfare Committee, for example, spent a couple of years

considering the relation between the recreational cinema and young people. As a result of their studies they published a report in 1938 which gave a great deal of information but reached no conclusions. It quoted extensively from material collected by the British Film Institute. This evidence seems to show that the harmful effect of films on the child under 14, especially in relation to juvenile delinquency, has been greatly exaggerated. This is not the view of the Scandinavian countries or of Belgium, where very strict precautions are taken only to show films to persons under 16 if they are considered positively good rather than as not harmful. Had the League discussions been able to be continued for another year some more precise standards might have been established. Nevertheless, some useful ground work was done which it is to be hoped will not be entirely wasted when peace returns.

In 1936 the League of Nations had a short discussion on films during the meeting of the Assembly. The matter continued to be under discussion until 1939, the advisory body being the Intellectual Co-operation Organization. The object of these discussions, however, seemed rather to make propaganda for the League idea than to consider the wider issues. As a result of the debates a small credit was voted and a Paris firm turned out a rather indifferent 30-minute film on the work of the Health Organization.

In considering what action might be taken in the future through any international organization that may be set up after the war, a clear distinction must be drawn between the use of the film as a convenient method of official propaganda, and of international action to control such effects of the film as may generally be agreed to be harmful to the community or its individual members.

Possible Post-War International Action.—In respect of the latter we may envisage perhaps a general *vœu* on the lines of the article in the Spanish-San Salvador treaty quoted above. We may also see some action developing out of the work of the Child Welfare Committee and certain principles established that should be observed in relation to the admission of children to the entertainment film. But unless the new international order is vastly more powerful than the old in overriding national sovereignties in what may be argued cogently to be purely domestic issues which vary from country to country with the temperament and traditions of the people, such resolutions will continue to be a statement of what is desirable rather than of what must be done.

In the matter of using the film as one of the means for making known the principles upon which the new order is based and for educating the peoples of the world to a more complete understanding of their neighbours and of the virtues of international co-operation, definite steps could be taken by means of an international convention.

Taking the entertainment cinema first, I have been very impressed with the effect of the Ministry of Information's "5-minute films." By agreement with the trade body concerned five minutes' screen time at every performance is put on one side to be used for Governmental purposes. In some other countries Government has laid down that in every programme has to be included what the Germans call a Kulturfilm. This is usually a travel picture, a film on popular science, or a political propaganda film. The principle of using screen time in the public cinemas for official purposes seems, in short, to be generally established. There is no reason why by inter-governmental agreement a certain proportion of that time should not be used on behalf of the international organization.

A further idea might be for the international body to establish an annual film contest on the lines of the erstwhile Venice Film Festival, and make awards to the best films in certain classes. The point of this suggestion is that it would be a means of inducing feature films being made with certain definite purposes in mind—and the feature film is the focal point of all cinema entertainment, for without it the programme becomes formless.

The Educational Film.—In another section of his book Professor Harley deals with the " cultural, documentary and educational films." As elsewhere, he gives some facts, but draws no very definite conclusions from them. He has not treated this aspect either in any great detail, but it would be a mistake to overlook the use of film non-theatrically, *i.e.* its use other than in the public entertainment theatre. The value of film for direct instruction and for use in the classroom was recognized directly the film was known. It did not start to develop, however, until some ten years ago, when was perfected the small portable machine, using non-inflammable film which needs no special fire precautions and is simple to work. According to the purpose of the lesson and the grade of school, sound or silent films are used. Unfortunately the school market was not very large and so not very profitable. A vicious circle developed. Companies would not make educational films because they could get no return on their money from hiring fees and schools would not buy the projectors because there were no films to show on them. The best evidence available shows that this state of affairs has almost come to an end in most countries. There is no doubt that at the end of the war there will be a big expansion in Great Britain, too, as a result of our war-time experience in using films for instructional purposes in the Services.

This aspect of films also engaged the attention of pre-war international organizations. In 1928 the Italian Government established an International Institute of Educational Cinematography attached to the League of Nations. Before it expired in 1937, when Italy left the League, it had accomplished one useful act. It got through a convention for facilitating free trade in educational films by means of certificates allowing them to enter a country Customs free. The convention included a clause which reserved the right of any country not to admit the film if it was not in line with its own system of education. Thanks to the British Government the convention was revised in 1938 and is theoretically still valid. Professor Harley quotes the text of a similar convention drawn up by the Pan-American Union and ratified by all the Latin-American countries. The U.S.A. is not a signatory for unstated reasons.

Films of an educational character can therefore circulate freely about the world. It remains to consider if any special classes of films should be fostered by international action. It will be recalled that the League of Nations wrote and circulated for inclusion in all countries' text-books what was called the " Common Chapters." These gave an account of the development of the League and called attention to the fact that international co-operation should be the normal method of conducting world affairs. There is accordingly a precedent for the provision of common teaching material by an international body, but none to enforce it being used.

Types of Teaching Film Needed.—The kind of material that would be wanted is, first, a series of films dealing with national subjects and expressing the life, ways of living and ideals of the individual nations. A concrete example would be a day in the life of a child in Great Britain, in Poland, or U.S.A., or Central Africa. There would be no difficulty in getting material of this nature made and a very simple piece of international machinery could be devised to have copies of each film made generally available to schools everywhere.

A second series would be classroom films on such general subjects as physics, mathematics, biology, geography, etc., which are in constant demand by teachers in every country in the world. These films would probably be made by private initiative and circulated under the international convention.

The last series of films would be international in character, built up to illustrate such material as was contained in the Common Chapters mentioned above. These films would have to be made by the international authority and would be used in conjunction with that general teaching of world affairs which it is hoped will be included in the school time-tables of the world by general agreement.

In any attempt to establish a new world we have seen that consideration should be given to the film as one of the tools whereby it can be shaped. The film is no more than a tool, but it is potentially dangerous and must be used properly. To suggest some of the possible ways in which it can be so used has been the purpose of this article. Entertainment shades into propaganda ; propaganda shades into pure education. The problem for the Governments is as old as the drama itself. What control or controls should be applied to a creative, artistic, emotional medium so as to prevent its abuse?

LEGAL AID WORK IN THE UNITED STATES.

[*Contributed by* JOHN S. BRADWAY, ESQ., *Director of the Legal Aid Clinic, Duke University, U.S.A.*]

THE term "legal aid work" is used in the United States to describe a national movement for giving to those persons who are unable to pay for it justice equal to that secured by those who can pay.[1] The obligation to render such service is based upon phrases in the Federal and State Constitutions providing that everyone shall enjoy "the equal protection of the law."[2] While no exact figures are available indicating the total number of persons entitled to this service, it is obviously very large.[3] A wide variety of legal problems confronts a man without funds as they do his more fortunate neighbour. The collection of wage claims, protection against the loan shark, the handling of parent and child difficulties and domestic differences are all included.[4] In particular, the legal aid movement seeks to lift the poor man over three administrative obstacles: the expense of court proceedings, the delay of court proceedings, the expense of a lawyer.

The service is rendered in a variety of ways, some under provisions of a statute ;[5] others by voluntary efforts on the part of bar associations[6] and lay groups[7]. Statutory aids make use of such machinery as the following: certain courts are given the power to assign a lawyer to represent a poor person in a civil case, or special provisions include a lawyer's fee for the plaintiff among the costs. In some jurisdictions a poor person complying with certain requirements may secure a waiver of court costs and fees.[8] In other jurisdictions specialized courts and administrative procedures are set up, among them being

[1] Literature describing Legal Aid work in the United States has been collected in a *Tentative Bibliography of Materials on Legal Work*, published in 1940 by the National Association of Legal Aid Organizations. See also, Reginald Heber Smith, *Justice and the Poor* (1919), The Carnegie Foundation, New York. In England see, Edward A. Parry, *The Law and the Poor*," London (1914) ; F. C. G. Gurney-Champion, *Justice and the Poor in England*, London, 1926.

[2] United States Constitution, 14th Amendment provides *inter alia* "nor shall any state deprive any person of life, liberty or property, without due process of law ; nor deny to any person within its jurisdiction the equal protection of the laws."

[3] Individual legal aid societies report large masses of cases annually, thus in 1940 the New York Legal Aid Society received approximately 30,000 applicants.

[4] The National Association of Legal Aid Organizations has adopted a uniform classification of data as to cases and clients. The list of types of cases in this group contains 40-odd headings.

[5] In 1927, the League of Nations published V. Legal 1927 V 27, *Legal Aid for the Poor*. Part I contains Laws, Regulations and Treaty Provisions regulating Legal Aid in certain countries. This is the most comprehensive survey available.

[6] See the Annual Reports of the Standing Committee on Legal Aid Work of the American Bar Association (1920-date). There are included in the series *Reports of the American Bar Association.*

[7] For a description of the work of one of these lay groups, see John M. Maguire, *The Lance of Justice*, Harvard University Press, 1928.

[8] For a discussion of the inadequacy of such laws, see John M. Maguire, "Poverty and Civil Litigation," 36 *Harvard Law Review*, p. 361.

small claims courts, juvenile courts and domestic relations courts. These tribunals are speedy and inexpensive and have a staff of clerks and others who make the machinery move even though the poor litigant cannot afford a lawyer.

In the criminal field there are a number of statutes authorizing the courts to appoint counsel to represent persons accused of the more serious crimes.[9] In some jurisdictions, the lawyer thus appointed is reimbursed from the public treasury.

The voluntary agencies, which are known as legal aid societies, perform an equally important function. They handle in the neighbourhood of 300,000 cases a year.[10]. They exist sometimes where the specialized agencies are not yet set up. They also handle types of cases which the specialized agencies are not equipped to handle. They are flexible and resourceful. They are law offices for the poor man. There are over 100 of them. Many of them are under the auspices of a bar association. In other instances they are established as non-profit corporations or municipal bureaus. Some of them are connected with law schools and are called Legal Aid Clinics.[11] Financial support comes sometimes from the public treasury, but more often from the philanthropic public through the medium of the local community chest. They are staffed by lawyers and clerks and are usually controlled by a board of directors, on which lawyers and the lay public are represented. They render service in and out of court and are helpful in gathering material as a basis for remedial or preventive legislation on the basis of actual cases they have handled. At least half of their work consists in giving people advice as to the law and involves no further action. Only about 10 per cent. of their cases ever get into courts.[12]

In the criminal field, the agency is known as the Voluntary Defender, as contrasted with the Public Defender, which is set up by statute and supported by public funds.[13] The Legal Aid Organization is generally recognized as a humanitarian plank in the public relations programme of the organized bar. For the community it is an agency which relates the functions of the lawyer to those of the social worker and the representatives of other professional groups.

Law Offices for Persons of Moderate Means.[14]—Legal Aid Service, in practice, is limited to those persons who cannot pay a fee. If a man can pay only a small fee, totally disproportionate to the amount of work involved, but still a fee, it is sometimes difficult for him to secure legal assistance unless some special agency is provided to help him. His own hesitation in asking for help is a serious factor. In the last few years experiments have been conducted to ascertain the need for, and the best method of supplying, this service. Investigation has produced figures indicating in some areas that four out of five persons coming to such an agency

[9] See Note 5, *supra.*

[10] See Annual Reports of the Secretary of the National Association of Legal Aid Organizations.

[11] C. W. Ferguson, " Bedside Manner in Law," *Readers' Digest*, January, 1937, Vol. 30, pp. 107–109.

[12] The administrative details of legal aid organizations are discussed in two pamphlets, *Legal Aid Bureaus* (a manual of practice), published 1935, The Public Administration Service: Chicago, Ill ; *Forms of Legal Aid Organizations in Middle Sized Cities and Smaller Communities*, published 1940 by the National Association of Legal Aid Organizations, 25 Exchange Place, Rochester, New York.

[13] See p. 205, *The Annals of the American Academy of Political and Social Science*, September, 1939 ; p. 16, Mayor C. Goldman, " Public Defenders in Criminal Cases " ; p. 24, Norris Fabricant, " Voluntary Defenders in Criminal Cases."

[14] Some materials on this new development are collected in the *Tentative Bibliography of Materials on Legal Aid Work* mentioned in Note 1 *supra.* See in particular, *The Economics of the Legal Profession*—a manual designed primarily for the use of state, local and junior bar associations, describing the results of the bar surveys which have been made to date ; the chief proposals which have been advanced for improving the economic condition of the profession and increasing its capacity for usefulness ; and the methods and forms which were used in the several surveys prepared by the American Bar Association's Special Committee on the economic condition of the Bar, Chicago, 1938.

have never been to a lawyer's office before. If their visit means nothing more than a desire to find out what the law is, it represents a definite advance toward a desirable reliance by the individual upon legal processes as a method of solving his difficulties. His alternatives are to employ extra-legal, and sometimes illegal, means, or to do nothing, which often results in an undesirable attitude of mind.

In Philadelphia there has been in operation during the past year a decentralized plan for a " neighbourhood law Office." Several of these offices were established in different sections of the city as limited partnerships. The public was informed of the existence of the office, but not of the name of the lawyer. Rules and a standard of fees were agreed upon and a system of record keeping was set up to supply certain desired information as to case and client. The annual report indicates an interesting development and much valuable information.[15]

In Chicago similar machinery is in operation on a centralized basis. The Chicago Bar Association secured a group of lawyers who were willing to render service to persons of moderate means, according to a definite set of rules. The applicant here comes first to the Chicago Bar Association office and is then referred to the particular lawyer.[16] A somewhat similar plan is in effect in Los Angeles.[17]

It seems clear that there is a need for organized assistance of this sort. Among the administrative problems involved are the ethics of informing the public about the existence of such a service, the establishment of a cost-accounting system to provide a fee schedule which will meet expenses and yet be within the reach of members of this particular class of clients, the supervision of the work to see that the quality of the service is maintained at a high level. The experiments are being watched with considerable interest.

MONEY IN THE LAW.

[*Contributed by* MARTIN DOMKE, ESQ., LL.D.]

LEGAL effects arising out of monetary regulations and exchange restrictions are dealt with by Professor Arthur Nussbaum in a comprehensive treatise on " Money in the Law " (Chicago : Foundation Press, 1939). Although there has been some delay in the notice of this publication it may be worth while in view of the importance of the subject to examine its contents. Nussbaum adopts a realistic approach to legal problems by the study of mercantile usages, contract forms and other facts illustrative of the efficiency of law. In no field is this view more appropriate than in currency where legal writers should always bear in mind that *" non ex regula ius sumatur, sed ex iure quod est regula fiat."* The first three chapters are concerned with money as such, and particularly with the conception of the monetary unit (chap. I) ; with the various kinds of money (chap. II) ; and with the systems by which they are co-ordinated on the basis of a unit (chap. III). In this chap. III many cases presented to English courts are widely discussed ; they deal with the fundamental problems of the legal relationship between government and money (p. 25)[1] and the rules governing paper money (p. 93).[2] While the sections opening the third chaper treat the subject of monetary systems in general terms, the concluding sections offer a discussion of the American

[15] Robert D. Abrahams, " Law Offices to Serve Householders in the Lower Income Group," 42 Dickinson, L.R., p. 133, April, 1938.

[16] See the *Chicago Bar Record* for July, 1940, " The Chicago Bar Association Lawyer Reference Plan—Report of the past four months' operation, January 10 to May 10, 1940." *The Bar Bulletin* (of the Bar Association of the City of Boston), vol. 12, sec. 11, p. 272, " Experienced Adviser Service."

[17] 16 *Los Angeles Bar Bulletin* (June, 1940, sec. 10). The entire issue is devoted to a consideration of the Revised Lawyers' Reference Service.

[1] *The Emperor of Austria* v. *Day and Kossuth*, 45 Eng. Rep. 861 (1861).

[2] *Banco de Portugal* v. *Waterlow & Sons, Ltd.* [1932] A.C. 452.

and English Colonial systems, thus furnishing a widely interesting historical survey. Chapters IV to VIII form the second and larger part of the volume. Devoted to an analysis of debts, *i.e.* of monetary obligations, they contain the bulk of the cases, and, generally, the material which will be of particular interest to the practising lawyer. These chapters progress from the pure and simple debt (chap. IV) through the impact of fluctuating currencies upon debts (chap. V) to the more complicated forms of debts, gold debts (chap. VI) and foreign currency debts (chap. VII), and conclude with the recent and revolutionary transformation of debts through exchange control (chap. VIII).

Nussbaum's work may be expected to exert influence although he criticizes some theories set up primarily by French courts. In Nussbaum's terminology these theories are : I—the " international " or " homeless " theory, II—the place of payment theory, III—the international payment theory, and IV—the concept of " territoriality."

The " Homeless " Theory.—The " homeless " contract is a consequence of the extension of the rule of autonomy of the will adopted by some French decisions. It is a well-established rule of conflict of laws of most countries, approved by Nussbaum (p. 378), that a contract having contacts with several countries is governed by the law chosen by the parties or implied by the text of the agreement or other circumstances indicative of their presumed intention.

The Place of Payment Theory.—The place of payment theory is still more widely held than the homeless contract theory. It obtains in Germany and Switzerland, as well as in England, Canada and the United States.[3] Research into the judicial views on gold and other protective clauses reveals a general trend to uphold such clauses, provided there is a place of payment or collection in the forum or at least outside the territory of the foreign legislature.[4] It is true that the arguments advanced are sometimes cryptic or confused. Nussbaum does not contest (*a*) the well-settled rule to the effect that the manner of performance is governed by the law of the *locus solvendi*, but he stresses the fact that this rule is inapplicable to questions concerning the substance of the debt and especially the amount due (pp. 152, 292, 380, 384). Nor does Nussbaum oppose (*b*) the construction rule under which in case of doubt the debt is contracted for in the money of the place of payment. He only recommends that this rule should not be rigidly applied (p. 439). He even reproaches French courts with having disregarded the principle in cases where loans quoted in terms of francs without other specification had been issued by French companies in France and in Switzerland, or in Switzerland alone, and payment had been tendered in depreciated French francs while the bondholders relying on the promise of payment in Switzerland claimed Swiss francs (pp. 457–60). What Nussbaum calls " bad law " (p. 283) is (*c*) the extension of the competence of the law of the place of payment to questions relating to the substance of the obligation. The bondholders to whom a foreign place of payment or collection is granted are given an option between several proper laws. This is indeed an approach to the homeless contract theory with the difference that the contract is not definitely homeless, but only until the option is exercised. But for all that, the place of payment theory is not less practicable than the homeless contract theory. Nussbaum objects that by itself the place of performance is not of great importance in the construction of pecuniary obligations (p. 399, cf. pp. 228–29). There is no need to disagree with this statement ; but just because the place of payment has no importance in itself, a place of payment or collection

[3] See the decisions quoted by Nussbaum (p. 383, n. 14), and recently the Royal Dutch Decision of the Superior Ct., Zurich, February 21, 1941, 37 Schweizerische Jur. Zeitung 350. *S. American Petroleum Corp.* v. *Columbian Petroleum Co.*, Superior Court, New York County, N.Y., *Law Journ.*, December 6, 1941, p. 1842.

[4] See the decisions of the Superior Court of the Netherlands (Hooge Raad) upholding the gold dollar clauses in loans with a Dutch place of collection on the ground of Dutch public policy : March 13, 1936 (Royal Dutch case), *Weekblad van het Recht* 1936, No. 280 ; April 28, 1939), Messageries Maritimes case), *Nederlandsche Jurisprudentie*, 1939, No. 895.

clause evidences the intention of the parties to establish a contact with the country where that place is situated.[5]

Nussbaum criticizes also another place of payment theory, viz. (*d*) the rule laid down in the Ralli Brothers and De Beéche cases[6]: "A promise, the performance of which is illegal at the place where it is to be made cannot be enforced." Nussbaum (p. 501, n. 55, s. 2) considers this principle as a "highly disputable use of the place of payment theory." That seems to be a misunderstanding. As explained by Lord Wright,[7] the principle does not mean that the *lex loci solutionis* determines the substance of the debt or the validity of the contract; only if the performance is in itself prohibited, the judge ought not to constrain nor to encourage the debtor to violate such a prohibition. Outside England this principle is not yet adopted by the courts, but there is a strong tendency in that direction.[8] It is to be regretted, therefore, that Nussbaum has not enlarged upon the construction and bearing of the De Beéche rule. This rule, like the Adelaide rule,[9] does not concern the conflict of laws proper, but is part of the internal (English) law on contracts, applied, however, by the device of public policy, to foreign contracts. A similar conception seems to play a part in non-English decisions both on gold clauses and, particularly, on exchange restrictions. If, for instance, French judgments on the gold dollar loans of the Siemens & Halske A.G.[10] and of the Société des Services Contractuels des Messageries Maritimes[11] differed sharply as to whether there is or not a place of collection outside the United States (in the first case), or Canada (in the latter case), the underlying idea perhaps is to give no judgment the enforcement of which would result in an illegality. All the more important are Nussbaum's conclusive arguments (p. 373) pointing out that the acts abrogating and nullifying gold clauses do not imply any prohibition of their fulfilment.

The International Payment Theory.—Nussbaum discusses at some length the French international payment theory. This detailed treatment is justified. French courts have since 1924 dealt with gold clauses and other monetary problems more than the courts of any other country. It is not possible, however, to agree to the author's unfavourable opinion of the French rulings. The international payment theory originated indeed in a confusion made by the French courts holding that abrogation and annulment of gold and other clauses protecting the creditor against a depreciation of the national currency is a necessary corollary of the legislation rendering irredeemable franc notes legal tender. Moreover, it may be that the judges were sometimes prompted by nationalistic motives, especially by the desire of protecting small French capitalists who had invested their savings in international loans based on gold francs. But fortunately the interest of the French investors accorded with the solution commanded by reason and equity. Though founded in some early decisions on a confused concept of "territoriality" of monetary laws, the international payment theory such as it has been elaborated since 1928 by an uninterrupted line of decisions of the Cour de Cassation, forms a body of law clear and consistent enough. So far as internal French payments are concerned, all gold and foreign currency clauses are void, but as regards inter-

[5] See Nussbaum, Public Policy and the Political Crisis in the Conflict of Laws, 49 *Yale Law Journal*, 1940, 1027 at 1031.

[6] *Ralli Brothers* v. *Compania Naviera Sota y Aznar* [1920] 2 K.B. 287 (C.A.); *De Beéche* v. *The South-American and Chilian Stores* [1935] A.C. 148 (House of Lords, 1934); adde *St. Pierre* v. *South-American Stores* [1937] 3 All E.R. 349 (C.A., 1937). See Cohn, 55 *Law Quarterly Review* (1939) 552.

[7] In *The International Trustee Case* [1937] A.C. 500 at 518–521.

[8] See Gutzwiller, *Der Geltungsbereich der Wahrungsverschriften* (1940) 131.

[9] *Adelaide Electric Supply Co.* v. *Prudential Assurance Co.* [1934] A.C. 122.

[10] Trib. civ. de la Seine, July 23, 1936, Sirey 1938 II 25 (ann. by Mestre).

[11] App. Court of Paris, April 24, 1940, *Rec. Gaz. Pal.*, 1940, I, 433.

national payments they are valid, and these two principles apply whatever may be the proper law of the contract.[12] In respect to international payments this theory leads to the same result as the homeless contract theory mentioned above. But the two theories are to be distinguished from each other, the concept of "international contract" in the sense of the homeless contract theory being not identical with the concept of "international payment." This latter concept can hardly be contained in a brief formula. Flux and reflux of values over the frontiers, though often mentioned by the courts, is not always required. It may be submitted that a payment will be deemed international, though the money paid does not leave the country, provided it is made in order to pay or to refund imported (or exported) values.

A recent case mentioned by Nussbaum (p. 347 n. 58), namely that concerning the 1927 loan of the Société des Services Contractuels des Messageries Maritimes, shows that the international payment theory does not apply only in favour of French creditors. The Appellate Court of Paris (*supra* n. 11) following the carefully reasoned judgment of the Civil Court rejected the application of the Canadian Gold Clause Act, though the loan was quoted in Canadian gold dollars and mainly floated in Canada. The judgment was delivered after the publication of Nussbaum's work and shows that his affirmation of a "breakdown" (p. 347) of the French doctrine was premature.

What justifies the privileged status of international payments? The basic idea is that the gold clause is but an aspect of the foreign currency debt. Nussbaum is right in stating that legislative abolition of protective clauses has been confined chiefly to gold clauses and that particularly the American and Canadian enactments would probably be inapplicable even where the parties contracted in terms of foreign currency to escape the dangers threatening their national currency (p. 421). But in the long run such a policy can hardly be maintained. If foreign currency stipulations become frequent they are not less contrary and prejudicial to the protection of the national paper currency than gold clauses.

In the field of conflict of laws, the consequence of this theory is easily deduced: the French legislature, by embodying the concept of international payment in the monetary laws of 1928, 1936 and 1937, laid down a general principle, viz., that in international payments the necessity of protecting the domestic currency does not warrant impairments of the basic rule *pacta sunt servanda*, particularly important in international commerce. Hence, foreign currency laws are to be disregarded inasmuch as they encroach upon transactions implying international payments. This is the justification of the international payment theory in private international law.[13]

The Concept of Territoriality.—The shortcomings of the traditional *ordre public* notion are apparent in the sections Nussbaum devotes to exchange restrictions. His account of the intricate enactments and of the great number of decisions already occasioned by this "most recent phase of monetary development" is admirable, but the solutions he defends are often questionable. The rough public policy theory which Nussbaum considers as the only legitimate explanation and basis for the attitude of the courts towards foreign exchange control (p. 488) overlooks the fact that the term "public policy" covers very different reasons for disregarding foreign rules applicable under the ordinary principles of conflict of laws. Making no distinction as to whether the foreign law under question is disapproved as unjust or as injurious or even as hostile, his public policy notion is sometimes too strict and sometimes too broad. Here appears the practical legal

[12] French gold clause or foreign currency decisions generally do not refer to conflict of laws, even in cases where exceptionally besides the monetary question the proper law is at issue. See, for instance, Cass, June 4, 1934, Soc. Brisson Frères c. Soc. des Grands Moulins de Bourlion, *Dalloz Hebd.*, 1934, 361; *Rec. Gaz. Pal.*, 1934, II, 202.

[13] For further details, see Domke, *Internationale Zahlungen*, in *Mélanges Streit*, Vol. I, Athens, 1939, p. 225.

bearing of seemingly theoretical questions on the nature of *ordre public international*.

According to Nussbaum the fact that the government of the forum has itself enacted laws of the same kind as the foreign law under question is no obstacle to a refusal of the application of a foreign law on the plea of public policy, no moral or ethical stricture being involved in the application of the public policy concept, viz., in the fact that a court will not carry out foreign measures injurious to the forum (p. 489). Nussbaum argues (p. 490): "The concept of public policy is 'relative' in the sense that its use depends on the extent to which the effects of foreign legislation are actually harmful to the interests of the forum. There must be a material contact of the cases with the forum to warrant the use of the public policy weapon." This "contact" theory is supported by good reasons in the law of domestic relations, but in the law of contracts and debts the forum should be a sufficient contact provided the debtor possesses assets at that place.[14] Still, no contact is required whatever may be the subject-matter of the foreign law, if the latter is properly hostile to the forum. Now, as Nussbaum proves by conclusive arguments (p. 489), the exchange restrictions of a country are not only prejudicial but also hostile to the laws and economy of all other countries by disrupting the relations and destroying the vested rights of the creditors—moreover, on a discriminating basis—with the only design to protect the domestic currency and planned economy. Of course, this economic-monetary hostility is not necessarily a political one; it is even compatible with political friendship; but for the judges such foreign laws remain hostile until the monetary question is settled by a treaty (for instance, a clearing agreement) and loses this character only within the scope of such a treaty (p. 513).

Nussbaum criticizes the courts (pp. 490–91) for having condemned German obligors without any mention of public policy. He thinks that, even if American law applies, the question arises whether the debtor is exonerated because of the impossibility of performance caused by exchange control, and that the courts' argument, viz., that impossibility due to change of foreign law is no excuse, is but a special application of the public policy doctrine. But why should public policy be invoked here? If the place of payment is in America, the plea of impossibility can be discarded on the strength of the principle (so well set out by Nussbaum at p. 220) of the indestructibility of monetary obligations. If the place of payment is in Germany, a judge inclined to follow the De Beéche rule will be faced with the question whether in such a case the American law—which is supposed to be *lex contractus*—obliges the debtor to make payment in America instead of in Germany. It is submitted that the answer will be in the affirmative provided that the debtor possesses assets in America. German laws forbidding him to make his assets available for the discharge of his debt are irrelevant, not in view of American public policy, as asserted by Nussbaum (p. 491, n. 16 and p. 492), but simply by virtue of the general principle of conflict of laws according to which it is not the German legislature but the *lex situs*, *i.e.* American law, that is competent to regulate the alienability of both movables and immovables, whatever may be the nationality or the domicile of the owner.[15] This point is not without importance,

[14] A recent French decision has with good reasons set aside defences based on foreign (German) exchange restrictions and constrained the debtor to make payment out of his French assets, without requiring a territorial contact, nor considering the petitioner's nationality: *C. H. Böhringer Sohn* v. *Legerlotz*, App. Court of Paris, July 20, 1939, 37 *Revue de science et de leg. finan.* (1939), 608. In the same sense Zurich courts refuted any application of foreign exchange restrictions (*de Beer* v. *Universale Rückversicherungs A.G.*, Superior Court, September 13, 1940, 40 *Blaetter für Zürcherische Rechtsprechung* (1941), No. 65, and, more recently, Commercial Court, December 20, 1940, 38 *Schweizerische Jur. Zeitung* 33).

[15] Thus in *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Credit-Bank* [1939] 2 K.B. 678, the plea of impossibility based on Hungarian exchange control was set aside without reference to English public policy, the facts that the debt was governed by English law and payable in England were held sufficient. See Note of F.H. in 56 *Law Quarterly Review* (1940) 153.

as the application of the public policy concept is always uncertain. The same rule, *i.e.* the competence of the *lex situs* appears to be overridden by Nussbaum (p. 501) when he says that " the underprivileged status of ' inland money ' transported abroad must necessarily be recognized, and that inland money cannot be used abroad as legal tender." He quotes two decisions[16] which are not conclusive as they concern transactions made at a time when the exchange restrictions in point were already in force. In such cases the obligor implicitly undertakes to comply with them. But the solution ought not to be the same if the debt was contracted prior to the enactment.[17] In this case, if the place of payment is outside the creditor's country, the debtor has the right to tender notes. The prohibition of unauthorized importation of those notes is not tantamount to a demonetization. Moreover, an enactment calling in bank notes without granting an indemnity to the owner is more than a demonetization, namely, a dispossession which apart from all public policy considerations can only be ordered by the *lex situs*. If the *locus solvendi* is in the creditor's country, the situation is complicated by the De Beéche rule. The creditor who accepts the notes is liable to a penalty : but the proper law will allow the debtor in such a case to defer payment or to discharge the debt by a deposit of the amount due with a public bank or office. Public policy is not to be invoked unless the debt is governed by the law of the creditor's country prescribing that the debtor must send a cheque.

Nussbaum's attitude towards exchange restrictions and in general towards the problems of public policy would have been more consistent if he had not so utterly slighted the concept of " territoriality," which he calls " one of the most cryptic and confused in the doctrine of the conflict of laws " (p. 487). He opposes especially—and he is right in doing so—the " unrealistic attitude " (p. 392, n. 49) of some French authors founding the non-application of foreign monetary laws on the *caractère strictement territorial des lois de police et de sûreté* (*lois politiques*). Surely, these formulae are too sweeping and too vague ; they are, moreover, at present abandoned by most French authors.[18] However, this doctrine is still defended by learned writers who claim that there is a true kernel in it, however insufficient may be the theories elaborated so far. It may be submitted, however, that the laws designated as " territorial " are often laws concerning property and other " real " rights, and the territoriality doctrine as applied here is a reaction against the neglect of the well-settled principle that such rights are governed by the *lex rei sitae*. In other cases the territoriality doctrine means that the foreign laws concerned are *a priori* irreconcilable with the *ordre public* of the other countries even if there is no contact with the forum. So interpreted, the notion of territoriality may help to distinguish the public policy doctrine. The foreign laws, contrary to public policy can be classified according to their subject-matter (contracts, property, domestic relations, succession, etc.) and, by another distinction, running across the former, according to the reproach made to them (unjust, injurious, hostile). Such a classification leads to a differentiation of more

[16] American Consular Court in Shanghai, October 5, 1936, *Juristische Wochenschrift*, 1937, 711 ; *Pyrmont, Ltd.*, v. *Schott* (1938) 4 All. E.R. 713.

[17] Trib. civ. de la Seine (ref.), July 18, 1938, *Norddeutsche Buchdruckerei und Verlagsanstalt A.G.* c. *L'Agence Centrale de Publicité pour l'Europe Centrale, Nouv. Rev. dr. int. pr.*, 1939, 171 (ann. by Erlanger) ; Trib. de Comm. de la Seine, November 16, 1938, *de Viforano* c. *Soc. Française Schenker et Cie., Dalloz Hebd.*, 1939, 63. Note that in both cases the place of payment was in Germany ; the Franco-German clearing did not apply, the payment not being due for imported goods.

[18] See *e.g.* Niboyet's vigorous polemics in his annotation of App. Court of Paris, March 25, 1937, rejecting the enforcement of the arbitral decision concerning the children of Prince Pierre Grimaldi de Monaco, Sirey, 1939, II, 25. As to the application of similar points of view in the most recent New York jurisprudence concerning the external effects of the (German) legislation in occupied (Dutch) territories, *cp. Amstelbank, N.V.* v. *Guaranty Trust Company of New York*, Superior Court, N.Y., *Law Journal*, November 29, 1941, p. 1728, and *Koninklijke Lederfabrick " Oisterwijk, N.V.* v. *Central Hanover Bank and Trust Co.*, App. Div., N.Y., *Law Journal*, December 20, 1941, p. 2070, affirming 177 Misc. 186.

or less " territorial " laws. This theory seems to be indispensable for the comprehension of the numerous apparently contradictory decisions on public policy, and —what is still more important—for preventing, by the establishment of some guiding principles, an anarchic use of the public policy concept such as to sweep away altogether with the last remnant of legal certainty in private international law.[19]

This latter idea and, in general, the aim of substituting clear-cut and consistent rules for vague slogans characterize the book of Professor Nussbaum. Our critical remarks have no other object than to remove some misunderstandings from the approach to a realistic conception of the problems of international monetary law as elaborated by this standard work.

POLISH LEGISLATION IN EXILE.

[*Contributed by* Dr. Manfred Lachs.]

The Continuity of the Polish State.—When Poland was invaded in September, 1939, and the Polish Government with the President of the Republic had to leave the capital, the former President of the Republic, Monsieur Ignacy Moscicki, acting within his powers according to the Polish Constitution of April 23, 1935 (*Polish Official Gazette*, No. 30, Section 227, Art. 24), transferred his power and nominated as his successor the present President of the Republic, Monsieur Wladyslaw Raczkiewicz. The act was done on Polish soil before the former President crossed the frontier into Roumania. It was published in the *Polish Official Gazette*. Acting within the powers of the Polish Constitution (Art. 12, Section A), the new President nominated the Prime Minister, General Sikorski, and on his proposal other Ministers. Thus, the continuity of the Polish State was preserved and the present President of the Republic and the Polish Government are legal successors of the previous President and Government and, although acting on foreign soil, have all the powers given to them by the Polish Constitution.

Legislative Acts.—According to the Polish Constitution, Art. 49, there are two kinds of Legislative Acts : (*a*) Bills (Acts), (*b*) Decrees of the President of the Republic. The legislative body which had the legislative power was the Polish Parliament. In view of the fact that the Polish Government had to be transferred from Poland the Polish Parliament ceased to act. The first seat of the Polish Government was France. In order to have at their side a democratic body, a substitute of a Parliament which was functioning in Poland, the President of the Republic issued on December 9, 1939, a decree calling into existence the Polish National Council (*Polish Official Gazette*, No. 104, of December 11, 1939). The competence and scope of activity of the National Council has been defined in Article 1 of the Decree, which reads as follows :—

> " For the duration of the exceptional circumstances caused by the war I am setting up the National Council as advisory body of the President of the Republic and the Government."

Article 3 adds that the National Council will issue opinions on questions which will be submitted to them by the Government and that the Government will

[19] The reader will see from the text above that we think there are at least three aspects which may justify the application of the public policy concept, namely, the foreign law may be set aside (*a*) as unjust (provided the legislature of the forum has not enacted similar measures), (*b*) as prejudicial to the interests of the forum (provided a " contact " exists ; the contact required varies according to the subject-matter), (*c*) as hostile (in this case, public policy discards the foreign law, regardless of both similar measures of the forum and contacts). Similar ideas have been expressed by E. Balogh, Le Rôle du Droit comparé dans le Droit International privé, *Recueils des Cours de l'Académie de Droit international*, 1936, III, t. 57, p. 641. The present writer made a first attempt in this direction in La notion de l'ordre public en matière d'emprunts internationaux, 35 *Rev. de Science et de lég. financ.* (1937) 217.

submit to the National Council in particular the Budget of the State. The opinions of the National Council can also refer to proposals concerning the need for issuing decrees, orders and regulations. Article 4 of the said decree provides that the National Council will also work on the future constitution of the State, in particular on questions concerning electoral regulations, either on the proposal of the Government or on their own initiative.

Under present conditions the only legislation of the Polish State in exile is provided by the decrees of the President of the Republic.

For over two years the Polish Government has been residing abroad. It was due to these exceptional circumstances that Polish legislation has been concentrated in two spheres : one being emergency legislative acts concerning current problems and affairs, the other the future problems of Poland, in particular questions which will arise after the invader is cleared from Polish soil.

It is rather difficult to give a detailed picture of all these legislative acts. It will suffice to give a short summary.

One of the most important decrees of the President was that invalidating all acts of the occupying powers (November 30, 1939, *Polish Official Gazette*, December 2, 1939, No. 102). The decree provides in Article 1 that all acts and orders of the authorities who are occupying the territories of the Polish State and go beyond the provisional administration of the occupied territory in accordance with the meaning of the 4th Convention of the Hague of 1907 concerning law and custom in land warfare—are null and void.

Article 2 says : That all acts and regulations of the authorities occupying the territory of the Polish State concerning the transfer, mortgage, confinement, or limitation of the property of the State, municipal bodies, State or municipal enterprises, public institutions, individuals and corporations in favour of third States, aliens or alien corporations, as well as the lodging of foreign citizens in immovable property under legal title, whatever it may be, are null and void. Section 2 continues : " Acts and Regulations of the States occupying the territory of the Polish State enumerated in Section 1 resulting from the application of a policy to exterminate national life are null and void."

Furthermore, the decree provides (Art. 3) that null and void are all acts of the occupying authorities concerning compulsory administration or custody of enterprises of Polish citizens and corporations in Poland as well as acts of these authorities concerning changes in the boards of companies and the personnel in charge of property of individual persons or corporations. In case that was done with the consent of the persons concerned and in their interest, it will require legal sanction of a Polish Court. Null and void are also all legal acts of the occupying authorities concerning property and rights of Polish citizens or corporations situated abroad.

Consequently the decree declares null and void all legal titles acquired by any person or corporation to any property or right as resulting from an act of the occupying authority, which is declared by this decree null and void.

The sanction of a Polish Court will be required to legalise acts of general administration or management of property even when that was done *bona fide* (Art. 6).

The decree protects all those who might be compelled to act under duress (Art. 7), declaring their acts as null and void and giving them the right to register their claims, which might be the subject of consideration by Polish courts.

The decree concludes with a warning to those who might help the enemy. Article 8 says, that any Polish citizen who would voluntarily assist the occupying authorities in their action is liable to penal servitude up to ten years and a fine or to the confiscation of his entire property.

The decree quoted above is no doubt one of the most important and will play a great part in all questions concerning the " restitutio in integrum " and claims for damages. On February 3, 1940, the President issued a decree providing

a moratorium of private obligations and debts incurred before October 1, 1939. They will not be payable before the lapse of a period of six months after the territory of the Polish State is cleared of the invader, or that part of it where the creditor and debtor is residing. That does not affect claims arising out of lease or hire, salary, contract for work, alimony, which were payable after October 1, 1939, or claims in cases where the creditor and debtor are residing abroad. The payment of all debts due to public institutions as taxes, fees, etc., is suspended by the decree of January 26, 1940. The same decree suspends the issuing of new taxes, fees, etc., for the duration.

The question concerning the disposition of property of Polish citizens abroad is settled by the decree of February 26 (*Polish Official Gazette* of February 29, No. 4). It lays down that Polish citizens now abroad are entitled to claim recovery of their debts and that the debtor has the right to release himself from the obligation by paying in to the Polish Ministry of Finance the amount due, which is kept on a special account. The Polish Minister of Finance has the right to empower a member of the Board or any other person who is entitled to act on behalf of the corporation but is unable to produce the necessary powers of attorney—by special certificates to represent the corporation and to act on their behalf. It states also that citizens of the occupying State or members of boards of corporations have no right whatsoever to dispose of the property of Polish citizens or corporations which is situated abroad.

In accordance with the general rule that war affects the operation of time in law, the decree issued five days earlier, on February 21, decides upon the suspension of prescription or other periods provided by law for the duration.

A further decree of March 9, 1940 (*Polish Official Gazette* of April 17, 1940, No. 7) concerns documents payable to bearer. It lays down that everybody who was the owner of a document issued to the bearer, on Polish territory, if that document was lost, destroyed or taken away unlawfully, can apply to the Polish Ministry of Finance with the request to secure his rights arising out of this document. (The decree gives details to this effect.)

Literary property, the right of authorship, of publishers, agents, etc., is subject of the decree of April 13, 1940 (*Polish Official Gazette* of May 31, 1940). A custodian who will represent the interests of all owners of that property is appointed. Another decree of April 29, 1940 (*Polish Official Gazette* of April 30, No. 9) concerns the collection and safeguarding of evidence against persons suspected of criminal offences under the authority of the Ministry of Justice.

Special powers, namely, the right of reprieve and reduction of penalty of persons who have been convicted by military or maritime courts are given to the Commander-in-Chief by the decree of June 6, 1940 (*Polish Official Gazette* of September 28, No. 13).

The decree of August 20, 1940 (*Polish Official Gazette*, No. 13) concerns the issuing of documents, such as birth certificates, certificates of marriage or death, etc., in lieu of originals which have been lost or are in occupied Poland.

The decree of September 4, 1940, deals with the collection of stamp and fee duties in matters concerning Polish maritime vessels.

The organization of the service in the Polish Navy is laid down in the decree of November 4, 1940.

The decree of November 27, 1940, concerns the release from State service of all civil servants who have been on leave for the duration.

The Budget of the Polish State is published in two decrees: one of December 9, 1940, namely, concerning the period from July 1 to December 31, 1940, the other of May 21, 1941, concerning the period from January 1 to December 31 of 1941.

There are also two decrees which deal with cultural matters. One of March 17, 1941, sets up the Polish Medical Department at the University of Edinburgh. This faculty has full rights of a Polish university. In order to look

after the education of many Polish children in this country and other cultural and educational matters, a special Office of Education and Schools has been constituted (decree of the President of May 1, 1941).

The decree of June 30, 1941, concerns the insurance of all persons who are employed in the mercantile marine and on fishing boats. That decree recalls a very important fact in Polish history, namely, that the Polish legislation concerning insurance, the protection of workers, etc., was of a very high standard. Poland adopted the most up-to-date and most progressive principles in her legislation.

War and peace aims are important problems which even now, at this stage of the conflict, attract our attention. The Polish Government duly considered that fact and the decree of August 28, 1941, concerns the formation of the Office for Political, Economic and Legal Research. Its aim and scope of activity are defined in Article 2 of the decree, which says that it will have to work on political, economic and legal problems for the future Peace Conference.

One of the latest decrees is the decree setting up Polish Maritime Courts in this country (September 30, 1941, *Polish Official Gazette* of September 30, 1941, No. 6) based upon the Allied Powers (Maritime Courts) Act, 1941 (4 & 5 Geo. VI, Ch. 21).[1]

The British Government has introduced in Parliament several measures to give certain powers to the Allied Governments in this country. They are intended to enable these Governments to carry on their work and bear evidence of the continuity of the States, whose acting force and symbols they are. (The author is dealing with that problem in pamphlet which is appearing shortly.) The first was the Allied Forces Act, 1940, then the Diplomatic Privileges (Extension) Act, 1941, and here we have the Allied Powers (Maritime Courts) Act. The decree of the President of the Polish Republic calls into existence the Polish Maritime Court. It is a Criminal Court with a Court of Appeal. The Polish decree further provides that the capital penalty is to be substituted by penal servitude for life and contains general principles of jurisdiction as well as regulations concerning procedure. The official opening of the Polish Maritime Court took place on January 6, 1942, in the presence of the Lord High Chancellor.

CODIFY OR CONSOLIDATE?

[*Contributed by* J. E. James, Esq.]

"Codification," so that all laws may be made simple, has, of course, an irresistible appeal in its sound, and as an ideal built on principles, such, for instance, as those outlined by Austin, is perhaps theoretically unanswerable—if we could all get and agree together and start afresh—but life is not "like that," and the desire to formulate everything in life seems rather a Teutonic than a British ideal. There are in fact many, and they include many Americans, who still attach great value to the principles of the Common Law. And the answer to the question may lie somewhere between the red tape of codification and the belief in justice resting on principle. Codes in other countries, from Justinian to the Napoleon series, intended "to present an orderly and comprehensive statement of the law as a whole," have not proved entirely successful. Our own Law of Property Act and its collateral coding statutes of 1925 certainly are not able of comprehension "by those whose conduct and interests they regulate." None the less, this piecemeal method of codification may be better for us than a complete Code drawn up by such a Tribonian Committee as is recommended by

[1] *See* article on the subject by the Viscount Simon, Lord High Chancellor of Great Britain, *supra*, p. 1.

Dr. Heber Hart in a suggestive new volume[1] dealing with various measures of legal reform. Dr. Hart states quite fairly that the Code would need amendment —perhaps " at intervals of a quarter of a century "—those prejudiced in the interval presumably suffering in unregarded silence—and that there would always be cases needing to be decided " upon an analogical extension of some provision of the Code, or upon some principle of general jurisprudence . . . or upon natural equity or justice," which seems to bring us back, so far as the " comprehensive statement of law " is concerned, to where we started from. As a middle course between the Coders and non-Coders may we suggest a Hercules Committee to recommend repeal of the litter of laws which has accumulated in the legal stable as an extension of the useful work which has been done by the Law Revision Committee in recent years. There is a danger that codification would add more words to this heap, and it may be safer to rely and build on the existing principles of law than to attempt to provide exact words which will meet all legal points that may arise. No one can take seriously Gibbon's comment on the abuses of Roman civil jurisprudence that " the laws of a free people should foresee and determine every question that may probably arise in the exercise of power and the transactions of industry." Austin accurately says, " Codification is the re-expression of existing law." But what about the afterwards? For example, what is to be the subsequent position of the judiciary? Dr. Hart suggests that judicial decisions should have no binding force. Are we then to provide, as in the German Code, that doubtful points of law are to be referred to a Law Commission, who will emit a declaratory law on the occasion of every case submitted to them? It is doubtful whether this system is suited to the British character. We have developed our own legal system and it should not be lightly scrapped or meddled with so long as it has public confidence.

With the two opening words of Dr. Hart's book—" In England "—we are faced at once with the old, old problem of how to deal with the differing laws of England and Scotland. Apparently the proposal is to omit the law of Scotland, to say nothing of Northern Ireland, from the Code, and there is no hope even in the mind of the author of a Common Code for Great Britain. Presumably, Scotland is to have a separate Code. Not a satisfactory scheme if we are to attempt, as we should, to promote, perhaps even to lead, a crusade for ultimate unification of world law. Again, the author seems to assume that the statement in a code of the " terms " (his own word) of laws in England in sufficient and unequivocal language is a mere matter of calligraphy, or of collection, only to be put in hand to be done, but as immediately afterwards it is stated that the law of England is " a body of principles or rules," the process admittedly cannot be simple. And herein lies a prime difficulty of the codifier—how is he to write down all the principles of law? He might, as a short cut, give Halsbury's " Laws of England " statutory force and the job is done. But if our Tribonian Committee is going to seek for principles and then select and put into words those proper and right for all time and for all circumstances, then it would seem rather a Bible than a legal code. The view can be quite rationally held that the principles of law are not able to be and should not be frozen or petrified in one final and permanent set of words, but need and depend on a sensitivity to right and wrong which goes beyond and is wiser than the mere autocratic and automatic enforcement of penal or mandatory provisions of Statutes and Orders. (*Shylock* v. *Antonio* is a case in point.)

The book seems to contemplate that the codification of all law—for application in England—which it advocates cannot be expected to be final and complete. And here we are left in a state of uncertainty, whether the author's desideratum is codification of law for England as it now exists or as it is deemed by those who

[1] *The Way to Justice.* By Heber L. Hart, K.C., LL.D. (London: Allen & Unwin). Pp. 146. 5*s*.

codify it that it should exist. Certainly in one respect it is the latter, for he considers that a judge's decision should no longer have binding force except as arbitrator only in the case before him. But having with one hand deprived the judge of law-making or interpreting power, he restores this with the other hand by saying that " where no pre-existing law is applicable " it will be " occasionally necessary " to have, and the litigant is to be satisfied with, " a fair and careful trial of his case by a tribunal qualified and desiring to administer justice." So judges are to become minor dictators and make law after all. Rather awkward for the legal adviser who may be consulted. Is he to say, " I find your case is not covered by the Code, so bring, or defend, an action and trust to impress the judge with the justice of your case." Which, to turn to another matter objected to in the book, seems to encourage rather than discourage the attempt to win cases by briefing the most expensive, because the most persuasive, counsel, and not to make law, as the author desires, equally open to rich and poor alike. On the whole, we rather think we prefer the position to-day, that there is a principle of common law applicable to every set of facts, and that such principle can be advised by lawyers and will be applied by the courts. Even if the author's proposal is adopted comes the further question: In what words will the Code give the courts power, when the Code does not foresee and provide for a case, to decide it " according to the dictates of natural justice "?

The author's task is easier in some respects when it comes to simplification of court procedure, and he is not likely to meet so many critics. The threat of the expense of a second appeal to a second appeal court has undoubtedly compelled many to refrain from seeking justice in the courts, and few lawyers, if any, would defend the present system. But his advocacy of abolition of the jury is not so simple. The system has something British about it, and should not be abandoned at the mere call of a well-sounding theory. Notwithstanding the author's assumption to the contrary, it is quite reasonable to hold the belief that twelve people fortuitously assembled are more likely to arrive at a just estimate of the facts of a case than three men assumed to be " of the highest character and ability." It may easily be that the jury system has given the ordinary citizen a confidence in the equity and reliability of British law which autocratic determination by experts might destroy. As a nation we do not like officialdom. One may hope that never will the juries of England fail to repeat, when necessary, the famous verdict of manslaughter for sheepstealing (or some other theft), because the prisoner would be hanged for the latter and could not be hanged for the former.

There is an inconsistency in the author's argument against the system which enables retributive damages to be awarded by juries. After objecting to the jury having such power he equally objects to judges doing the same thing.

Is it then suggested that the law (*i.e.* the New Code) could lay down a scale of damages for grades of libel and that there should be no discretion as to amount left to jury or judge?

Capital punishment and flogging are perennial subjects of argument and no doubt rightly so. Whether it is better to reform the criminal or punish him, or a bit of both, is still unsettled. Whether it is true to say that the Manchester garrotters were got rid of by floggings when other measures had failed is a matter of individual opinion. The author calls for the total abolition of such barbarous forms of punishment. It may be that all punishment as such is barbarous and that Gentle Alice Brown should be reformed by gentle treatment. The case made by the author for calling on a prisoner to give evidence is on sounder ground, provided we don't descend in this country to third degree methods.

In his final chapter on " Simplification of Law," the author deals with a subject on the general desirability of which there is little likelihood to be much difference of opinion. We can probably all agree that the reduction in bulk of

civil law would be beneficial, but we do not accept his dictum that most English lawyers would doubt its possibility. The methods of simplification advocated are, however, not so convincing. The New Code is to make rights and liabilities clear by its provisions, but this is hardly effected by the new law of contract, recommended in the form of a clause for the Code, namely, that an agreement is to be enforced by the court " according to the construction the court thinks ought to be placed upon its terms." So there is no certainty after all ; the court is to be given arbitrary powers, and we are back to the " Cadi."

The draft clause for the Code dealing with torts is no better. It relies on that dangerous fellow, the reasonable man, and damages are to be recovered from the unreasonable for every dereliction of " duty " (undefined).

It is only fair to say that the author is quite honest in his belief, for he says expressly that these provisions would, in his opinion, be as satisfactory to suitors and the public as the present legal system. This may even be so, but do not call it making law which can be known, because, in fact, the law would have to be ready made for each separate case, prior judicial decisions having no authority. The author, however, makes some case for his point of view by reference to the existing legal principles of *contra bonos mores* and *ex turpi causa non oritur actio*. The answer seems to be that these are principles added to the law and not, as the author would have it, the whole expression of the law. One cannot work a legal system on the easy basis of " Be good—if you are not you will be liable in damages."

Dr. Hart's book is undoubtedly a useful addition to the literature on the subjects dealt with, and has a reasonable man as author, but whether all men " of the highest character and ability " and all judges can be accepted as equally reasonable is more uncertain. He would no doubt agree that support should be given to the Consolidation of Statute Law on particular subjects and the repeal of all statutes and laws possible, and would welcome this cleansing process. Perhaps then in time the Consolidation would begin to look like a Code.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L., LL.D.]

The Liberty of the Subject in Time of War.—The decision of the House of Lords in *Liversidge* v. *Anderson*,[1] though it has been severely criticized, and stress has been laid on the dissenting view of Lord Atkin, was inevitable in view of the clear trend of judicial opinion[2] in earlier cases. Perhaps the most satisfactory exposition of the view of the House is that of Lord Macmillan in its insistence on the view that, in time of emergency, when the life of the whole nation is at stake, a Defence Regulation may properly be given a meaning which, by reason of its invasion of the rights of the subject, the courts would be slow to attribute to a peace-time measure. On this basis[3] it is easy to accept the view that the words in Regulation 18B " if the Secretary of State has reasonable cause to believe," suffice to leave it to him to be judge of what is reasonable cause to the exclusion of judicial intervention. This view beyond doubt gains strength from the argument that the issue involved in a decision to intern is not one proper for judicial consideration, but a matter of executive discretion, and that it is in the public interest that it should be determined personally by the Secretary of State who is immediately responsible to Parliament. The strength of Lord Atkin's dissent lies in his doctrine that even in war the duty of the courts is to stand between the subject and any attempted encroachment on his liberty by the executive, and the indisputable fact that the words " has reasonable cause to believe," both by common law and by interpretation of statute law regularly authorize the courts to determine the existence of such cause. He admits that a court would normally accept as reasonable the Home Secretary's decision to detain, but he stresses the suitability for judicial decision of the prior question, whether the person concerned was of hostile origin, association, etc. As a matter of fact, it is difficult to deny that the choice of terms in the Regulation was unfortunate. As the intention of the executive was to obtain an unlimited power of preventive detention of certain classes of persons, it would have been far better to use terms suitable to the occasion. The difficulty really was caused by the effort to meet House of Commons criticism of the earlier form of the Regulation, which merely required the Secretary of State to be " satisfied " ; the new

[1] 58 T.L.R. 35.

[2] See *Journ. Comp. Leg.*, Third Series, vol. xxiii, pt. iv, p. 182.

[3] Cf. *dicta* of Lords Finlay and Atkinson, *R.* v. *Halliday*, [1917] A.C. 260, at pp. 269, 271.

phraseology was doubtless thought by many members of the House to introduce a power of judicial control which the executive never contemplated. At any rate, after the debate in the Commons on November 27, there is no doubt that the House accepts the governmental position as necessary.

Returns to Writs of Habeas Corpus.—In *Greene* v. *Secretary of State for Home Affairs*, the House of Lords dealt with the issue what would be in these detention causes a sufficient return to a writ of *habeas corpus*. Lords Macmillan and Wright favoured the view that the Minister's detention order would suffice, its authenticity and good faith not being impugned[4] and that an affidavit by the Minister was not normally necessary, Lord Maugham pointed out that the fact that the Minister was entitled to withhold from the court the grounds or part of the grounds on which he had formed his reasonable belief was a valid reason for the court to refuse a writ without demanding an affidavit. It seems, indeed, to follow from the ruling in *Liversidge's* case that an affidavit would serve scant purpose. No doubt the orders of the Secretary of State must be made in good faith, but it is difficult to conceive either that a Minister would act dishonourably or how, if he did, it could be established. One matter, however, has been established: the Minister does not act automatically in these issues, and a considerable measure of safeguard for the subject is afforded by the right of an internee to appeal to the Advisory Committee.[5]

Provincial Powers to Regulate the Administration of Justice.—In *Att. Gen. for Alberta and Winstanley* v. *Atlas Lumber Co., Ltd.*,[6] the issue was raised of the validity of the Debt Adjustment Act, 1937, of Alberta, which forbids the bringing of suit for the recovery of a debt from a resident debtor except with the permission of a Board appointed by the Government. Suit was brought without permission on a promissory note, and the right to do so was affirmed by the Supreme Court. Duff C.J., and Kerwin J., based the invalidity of the Act, so far as it concerned promissory notes, on its conflict with the Bills of Exchange Act, R.S.C. 1927, c. 16, which gave the holder of a note the right to sue; such legislation was *intra vires* the Dominion by the British North America Act, 1867, s. 91 (18). Rinfret J. insisted that the Alberta Act attempted to take away from the courts a power expressly conferred on them by the Dominion in virtue of the exercise of one of its exclusive powers. Davis J. held that, as the constitution gave the province power regarding the constitution, maintenance and organization of courts, with right of appointment to the Dominion, it was *ultra vires*, at least in respect of a matter within the exclusive competence of the Dominion, to place in the hands of a non-judicial body the right to regulate access to the ordinary courts. Hudson and Taschereau JJ. stressed the fact that the province's power to regulate the administration of justice must be taken to mean administration according to the laws of the Dominion or of the provinces as the case might be. It could not by its action destroy a right given by a Dominion Act which was *intra vires*.[7]

The Enforcement of Orders in Council under the War Measures Act.—The dislike of courts for delegated legislation is interestingly illustrated by the decision in *The King* v. *Singer*.[8] Under the War Measures Act, R.S.C. 1927, c. 206, an Order was made forbidding the sale of codeine, but no penalty was specified, and it was therefore denied that one could be imposed. The Criminal Code, s. 164, penalises breaches of Acts of the Parliament of Canada, but the majority of the Supreme Court declined to treat the Order as equivalent to an Act; the one was passed by Parliament, the other only by Government. This view was supported by the fact that the War Measures Act provides that Orders shall have the force of law, and shall be enforced by such courts as the Governor in Council may provide, and he was authorized to prescribe penalties, thereby indicating a special mode of procedure and excluding any other. Davis and Hudson JJ. dissented, relying on the principle asserted in *Willingale* v. *Norris*[9] that breach of regulations under a statute is an offence against the statute itself. The point is a narrow one.

Provincial Control of Professions.—In *Cowen* v. *Att. Gen. for British Columbia*[10] the plenitude of provincial power to regulate dentistry was established by the recognition of the right of the province to forbid the publication of an advertisement by a dentist, not registered under the Dentistry Act, holding himself out as practising in the State of Washington. It was pointed out that the Act did not prohibit the introduction of papers containing the advertising cards of dentists, or the going out of the province to consult them, but dealt only with acts done within the province. One provision in the Act was queried by the Court; it might be construed as forbidding the publication in the province of advertisements by dealers or manufacturers of dental supplies; that might transcend the powers of the province, but the provision, if invalid, was severable. The case thus could be distinguished from *Union Colliery Co.* v. *Bryden*[11] where the statute in question was held to infringe the exclusive authority of the Dominion over naturalization and aliens.

Petition of Right in respect of Crown User of Patents.—As in England, a right is given by the Patent Act, 1935, to a patentee, whose patent is used by the Crown, to have reasonable compensation as ascertained by the Commissioner of Patents. This right can be enforced if denied by a petition of right which is competent under s. 2 (*c*) of the Petition of Right Act and s. 18 of the Exchequer Court Act.[12] The court can then make a declaration of rights,

[4] 58 T.L.R. 53. [5] Mr. Greene was in fact released on the advice of the Advisory Committee.
[6] [1941] S.C.R. 87. [7] See *Toronto* v. *York*, [1938] A.C. 415, 427. [8] [1941] S.C.R. 111.
[9] [1909] K.B. 57, 64, 66, 67. [10] [1941] S.C.R. 321. [11] [1899] A.C. 580. [12] *The King* v. *Bradley*, [1941] S.C.R. 270.

which is in no sense a mere declaratory judgment in the sense of *Dyson* v. *Att. Gen.*[13] The procedure in that case is only competent when a petition of right would not lie, as pointed out in *Esquimalt and Nanaimo Rly. Co.* v. *Wilson*[14] by the Privy Council which gave only a limited approval to that decision. The Supreme Court held clearly that the user of the patent could not be tortious. In the Exchequer Court[15] stress was laid on the indication in *Rowland* v. *Air Council*[16] that in England a petition of right would lie in such a case, though no action for a declaration of validity of a patent or for compensation for user would lie against a Government department.

Government Suits in Eire.—A curious anomaly was revealed by the proceedings in *A.G.* v. *Crawford*.[17] The Attorney General had taken proceedings for fraudulent evasion of customs duties, a penalty of £100 being claimed. The District Justice dismissed the summons and holding that it was a proper case for the award of costs against the Attorney General, if he had power to do so, stated a case for the opinion of the High Court. Rule 37 of the District Court Rules provided generally that a justice might award costs against a complainant other than the Attorney General or a member of the Garoa Siochana, but excluded from this rule revenue cases, so that they were left to be covered, if at all, by the pre-existing law. It was urged that the case could be governed by s. 2 of the Crown Suits Act, 1855, which allows a defendant costs, or s. 5 of the Customs, Inland Revenue and Savings Bank Act, 1877, which provides that in proceedings by the Crown under the Customs Acts, the same rules as to costs should be observed as in proceedings between subject and subject. The fatal difficulty, however, was that the Constitution of Eire by Articles 6, 12, 15, 25, 28, 30, shows clearly that the Crown has no place in the Constitution. An effort was therefore made to claim that the proceeding was analogous to a suit by the Crown, using the term to cover the Department of State now exercising the functions of the Crown under the British regime. But Hanna J. rejected this ingenious argument on the ground that there had been no legislation adapting the term " Crown " in the sense suggested. Maguire J. held also that the Revenue Commissioners under even the Irish Free State Constitution had not represented the Crown. They had been given by express enactment, s. 38 of the Finance Act, 1924, in respect of debts due to the Central Fund the rights and priorities which had " heretofore attached to debts due to the Crown," terms negativing the view that the Crown under the Free State Constitution continued to denote a department functioning in the State. The position, of course, is anomalous, since costs to either party are now denied, and Hanna J. stressed the desirability of legislative action to remove the anomaly.

The Emergency Powers under the Constitution.—It is one of the most remarkable provisions of the Constitution that Art. 28 sub-s. 3 enacts that nothing in the Constitution shall be invoked to invalidate any law which is expressed to be for the purpose of securing the public safety and the preservation of the State in time of war. The last words were extended by the First Amendment of the Constitution Act, 1939, to cover cases where the State was not actually at war, but both Houses of Parliament had resolved that, arising out of a war, a national emergency exists affecting the vital interests of the State. Under the Emergency Powers (Amendment No 2) Act, 1940, a Military Court was set up with power to inflict the death sentence on persons charged with certain offences, including murder, and two persons were duly convicted of murder and sentenced. The issue of the validity of the proceedings was raised on *habeas corpus*.[18] Gavan Duffy J., and on appeal the Supreme Court, upheld the validity of the condemnations. The points of chief interest decided were that the First Amendment was well within the power of alteration of the Constitution by simple Act during the first three years of its operation. It was argued that the President should have consulted the Council of State in view of the character of the Act in order to consider whether a referendum should not be held, but the Court held that that was clearly a matter for the discretion of the President. It was also ruled that it was sufficient to comply with Art. 28 that in their long titles the Emergency Powers Acts should be expressed to be made for securing the public safety and the preservation of the State in time of war, and that it was not necessary that they should state that the necessary resolutions applying the term " time of war " had been passed, it being admitted that the Orders had been duly passed. Lastly, it was claimed that the Rules under the Act had not been made and published in accordance with the terms of the Rules Publication Act, 1893. But it was ruled that that Act does not apply to Orders made by the Government of Eire, which is not covered by the words " His Majesty in Council," and it was suggested that a new Act appropriate to the State was desirable.

The Position of Special Courts.—*In re MacCurtain*[19] makes it clear that the Special Criminal Court set up by Part V of the Offences Against the State Act, 1939, is validly constituted. Art. 38 (3) of the Constitution allows the constitution by law of special courts in cases where it may be determined, in accordance with such law, that the ordinary courts are inadequate to secure the effective administration of justice and the preservation of public peace and order. In the case in question a conviction and sentence were attacked on the ground that the law in question authorized the Government to determine when Part V should come

[13] [1911] 1 K.B. 410. [14] [1920] A.C. 358, 364, 365, 367, 368. [15] [1941] Ex. C.R. 1.

[16] (1925) 42 R.P.C. 433; (1927) 44 R.P.C. 453, 458, 459, 461.

[17] [1940] I.R. 335; cf. *A.G.* v. *District Justice of Ballyhaunis*, *ibid.* 344, which was decided on another point.

[18] *In re McGrath and Harte*, [1941] I.R. 68. [19] [1941] I.R. 83.

into force (s. 35 (2)), and the Attorney General (s. 46 (2)) to secure trial by a Special Court in any individual case by certifying that the ordinary courts were inadequate for the effective administration of justice and the preservation of public peace and order in relation to the trial of the person concerned. Gavan Duffy J. and the Supreme Court had no difficulty in holding that Parliament had full authority to delegate to the Government as the proper authority the decision to make Part V operative, and also to choose the Attorney General as the proper authority to select the individual cases to be tried in this way. It was vainly urged that the fact that the Special Court was composed of military officers only was inconsistent with the Constitution. Though courts composed of military officers are provided for in certain cases under Art. 38 (4) of the Constitution, that is quite irrelevant to the powers given by s. 3 of the Constitution.[20]

Act of State and State Succession.—In *Secretary of State* v. *Sardar Rustam Khan*[21] we have once more asserted in its most absolute form the doctrine that British Courts cannot adjudicate on issues of State succession. By agreement of 1903 the Khan of Kalat transferred on certain conditions his whole sovereignty over the sub-division of Nasirabad to the British Government. The agreement might easily have been interpreted as an outright cession transferring the territory so that it became part of the British Dominions; but the Privy Council held that it should be deemed a lease in perpetuity, so that the sub-division remained Kalat territory, with the result that the Foreign Jurisdiction Act, 1890, became applicable to it. Thus the Crown by s. 1 of the Act could exercise the jurisdiction conferred by the lease as amply as if that jurisdiction had been acquired by conquest or cession. The Khan had granted certain rights over part of the lands leased before the lease, and the grantees claimed rights under the grants which the Indian Government ignored. In a suit brought before the Additional Judicial Commissioner in Baluchistan decree was given declaring the rights of the claimants in the lands in question, and the issue came before the Privy Council on appeal by special leave. The Judicial Committee had naturally no difficulty in holding that the issue was covered by authority; it was laid down in the case of the seizure of Tanjore[22] on the death of its last Rajah, of the annexation of Pondoland[23] to the Cape, of Ahmedabad[24] ceded by the Gaekwar of Baroda, and above all in *Vajesingji* v. *Secretary of State for India*.[25] In that case the Maharajah Scindia in ceding certain Gwalior territory had expressly stipulated that the conditions of existing leases should be respected. But the Judicial Committee laid it down that, however territory was acquired, whether by conquest, cession or occupation of territory not under a recognized ruler, an inhabitant of that territory can make good in the municipal courts of the new ruler only such rights as the new sovereign has recognized through his officers. Nor did it make any difference that recognition of the rights had been promised in the instrument of succession. This, of course, is only one side of the principle that private persons cannot enforce in municipal courts rights created by treaty for their benefit.[26] It should be added that the Committee stressed the fact that no evidence had been brought that the Government had acted unfairly to the claimants, though even had it done so, no redress would have been possible by judicial action.

The Relations of Treaties to Statutes.—There is nothing essentially new in the decision in *Hoani Te Heuheu Tukino* v. *Aotea District Maori Land Board*,[27] an appeal by special leave from the Court of Appeal of New Zealand, but two principles were invoked by the appellant which doubtless merited examination by the Judicial Committee. The appeal arose out of a charge on certain native lands imposed by s. 14 of the Native Purposes Act, 1935, and it was contended, obviously with a good deal of force, that the legislature had acted unjustly, whether out of incorrect information, or on actual deception on the part of someone in whom it placed reliance. But the only and complete answer was that no court can go behind the terms of an enactment, a principle laid down in *Labrador Co.* v. *R.*,[28] and obviously essential. The second ground of appeal was that the Act in question was *ultra vires*, as a derogation from Art. 2 of the treaty of Waitangi, which guarantees the people of New Zealand full possession of their lands. Obviously, as the treaty was an act of State, no municipal court could entertain claims based on it, unless statutory provision existed, and it was pointed out that s. 73 of the Constitution Act of 1852 gave in effect statutory sanction to Art. 2. But, though power to alter that section was not given to the New Zealand Parliament by the Act, it was conceded by an Imperial Act of 1862,[29] and the power was exercised by the New Zealand Native Land Act, 1873, by which the provision was repealed. But the Judicial Committee added that the provisions of the Colonial Laws Validity Act, 1865, operated to the same effect, and this dictum is of the highest importance, as it is the first pronouncement ever made by the Board on the disputed issue[30] whether that statute applies to the Constitution of New Zealand. The difficulty arises from the fact that, as there was express provision

[20] The Constitution itself refers to the divisions of the Articles as sections, the judgment styles them clauses. But elsewhere they figure as sub-sections or paragraphs (*ibid.* pp. 71, 75), and the subdivisions as clauses. Uniformity seems desirable.

[21] 57 T.L.R. 534. [22] *Secretary of State in Council of India* v. *Kamachee Boye Sahaba* (1859), 7 Moo. I.A. 476.

[23] *Cook* v. *Sprigg*, [1899] A.C. 572. [24] *Secretary of State for India* v. *Bai Rajbai*, (1915) L.R. 42 I.A. 229.

[25] (1924) 51 I.A. 357. [26] *Civilian War Claimants' Association* v. *R.*, [1932] A.C. 14.

[27] L57 T..R 419. [28] [1893] A.C. 104, at p. 123. [29] 25 & 26 Vict. c. 48.

[30] Keith, *Responsible Government in the Dominions* (1912), 1436–8.

by statute subsequent to the Act of 1852 defining in detail the power of alteration conceded to the local Parliament, it was possible to contend that the Act of 1865 must not be deemed applicable to the Dominion. This doubt may now be deemed to be resolved in favour of the widest constituent power in New Zealand, *e.g.*, the abolition of the upper house.

The Limits on Criminal Appeals.—In dismissing 13 petitions for special leave to appeal from confirmation by the High Court of Lahore of Sessions Judges' sentences of death for murder, the Judicial Committee [31] recorded its disapproval of the certificates given by counsel in India that the petitioners had reasonable grounds for appeal. It is, of course, obvious that grave injury is done to the course of administration of criminal justice by interposing the delay before execution of the sentence by an appeal, and the Board assumed that the certificates could only be given under a misapprehension of the principles governing its action in such cases. It is not a revising court of criminal appeal; it is not concerned with the weight of evidence, the conflict of evidence, inferences drawn from evidence, or questions as to corroboration or contradiction of testimony, or whether there was sufficient evidence to satisfy the burden of proof. It would not review the exercise of the discretion of the previous tribunal as to permitting cross-examination of a hostile witness or in awarding punishment. It would not review the facts of a criminal case or set aside conclusions of fact. Broadly speaking, it would only interfere where there had been an infringement of the essential principles of justice, such as a refusal to hear the accused or to permit him to call relevant witnesses. Or if the court had no jurisdiction to try the crime or to pass the sentence. Or if the tribunal were not properly constituted, or incapable of understanding the language in which the proceedings were conducted,[32] or were shown to have been corrupt. This list can hardly be regarded as exhaustive, but it is clear that the Privy Council is troubled with useless petitions.

[31] *The Times*, July 17, 1941.

[32] *Ras Beharidal* v. *King-Emperor* (1933), L.R. 60 Ind. App. 354.

NOTES.

Corrigenda.—It is much regretted that Sir Sidney Abrahams was described in the last number of the *Journal* as formerly Chief Justice of Zanzibar. In fact he held office there as Attorney-General and was afterwards Chief Justice of Uganda from whence he proceeded to Tanganyika and Ceylon.

Although the review of Ontario legislation for 1939 published in Parts 2 & 3 of Volume XXIII was kindly procured for the editor by Mr. J. D. Falconbridge, K.C., it was actually written by Mr. Kenneth G. Morden and should have borne his name.

Testator's Family Maintenance.—In an article under this heading in the last issue of the *Journal* there occurs a statement as to the degree of liberty of testamentary disposition in Scotland which in the general terms in which it is couched is misleading save to those well acquainted with Scots law. The statement that " in Scotland the movable estate is inalienable by will and must descend in fixed proportions to the testator's wife and children " requires considerable modification if it is to express with accuracy the actual legal position.

In Scots law there is no provision which either directly or indirectly makes the whole movable or personal estate of a married man or woman inalienable by will. The widow and children have the indefeasible rights of *jus relictæ* and *legitim*, each amounting to one third of the movable estate of the husband and father. He can, however, deal with the remaining one third of his movable estate as he pleases. If he has no children, the widow's *jus relictæ* is increased to one half of the movable estate and the testator can deal with the other half. Similarly, if the wife predeceases the husband, the children's *legitim* is increased to one half, the other half being disposable by Will. The one third or one half disposable by Will is known as the " dead's part." *Jus Relictæ* and *legitim* are common law rights, and prior to 1881 no such rights were exigible from the movable estate of a married woman at the instance of the husband and children. The Married Woman's Property (Scotland) Act, 1881, gave to the husband a right, known as *jus relicti*, in the wife's movable estate, this right being exactly similar to the wife's *jus relictæ*. By the same Act children were given the right of *legitim* in the mother's movable estate. It is, however, misleading to say that in Scotland the movable estate *must* descend in fixed proportions to the testator's wife and children. Apart from the fact that there are several ways in which these legal rights can be discharged, a testator can divide his or her estate as he or she pleases between the surviving wife or husband and children. If the division is stated to be in lieu of the legal rights, the surviving spouse and children must choose whether they will take under the will or claim their legal rights in the estate. A Will which is challenged by the surviving spouse and children claiming their legal rights is still good so far as the disposal of the dead's part is concerned.

In Scotland the children have no indefeasible right in the testator's heritable or real estate. The widow has the legal right of " terce " in the husband's real estate. This is a right to a life-rent of one third. The husband has the right of " courtesy " in the wife's real estate, this being a life-rent of the whole of the wife's real estate, but this right is only exigible if there has been a living child of the marriage. Freedom of testamentary disposition of the real estate in Scotland is restricted by these rights of " terce " and " courtesy."

J. C. G.

Cause and Consideration.—Probably no doctrine of French law has been productive of so much academic and seemingly barren controversy as that of cause. Writers have stigmatized it as an artificial, scholastic and useless notion, while many of the legal systems inspired or influenced by the Code Civil have discarded it without—be it said—any apparent practical consequences.

Art. 1108 of that Code specifies as one of the requirements for a valid agreement " une cause licite dans l'obligation," and Art. 1131 provides that an obligation lacking cause or founded upon an erroneous or unlawful cause can have no effect. Students of comparative law may be tempted at the first blush to see in these provisions the equivalent of the common law rules of consideration, " those vestigial survivals of procedural evolution," the utility of which has similarly been challenged. On closer examination, however, the analogy, seductive as it is, proves to be misleading.

The distinction between the two doctrines has been clearly brought out by Mr. Malcolm S. Mason in his contribution to the remarkable set of papers on the common law doctrine in the May, 1941, issue of the *Columbia Law Review* :—

" The cause of a promise is the purpose for which it is made—not the immediate, personal motive of the actual promisor, but an abstract conventional purpose recognized by the law

for the type of contract promise intended. From this broad point of view a promise is made either in exchange for a counter-benefit or out of a desire to confer a gratuitous benefit. In the first case the cause of the promise is the desired exchange; in the second, the cause is the promisor's liberal intention. Either cause satisfies the requirement that a promise must have a cause. Thus it is clear . . . that any promise satisfying the remaining basic requirements of civil law contract doctrine, namely, a promise seriously and freely given between persons having adequate capacity and relating to a definite and licit object, must necessarily satisfy the requirement of cause, for the cause will be either the desired exchange or a desire to confer a gratuitous benefit."

How widely and essentially cause may differ from consideration is plain from this analysis. A merely liberal intention (*animus donandi*) may furnish an adequate cause for an enforceable promise. Moreover, the requirement only "reduplicates other elements of civil law contract," and to that extent may be fairly described as a jurisprudential truism. Consideration, on the other hand, is an operative requirement: its absence may invalidate a promise which would otherwise be binding.

It does not follow, however, that the notion of cause is necessarily useless. Mr. Malcolm S. Mason pertinently observes that the treatment accorded to a promise will often vary with the cause assigned to it. For instance, where the cause is an expected counter-benefit, the inadequacy of the return may indicate the presence of mistake, fraud or duress, and inquiry into the cause of the promise will have served to focus attention upon these issues. The inadequacy of the return, on the other hand, would have no such significance in the case of a promise alleged to have its basis, *e.g.* in a desire to adjust a family difficulty. Cause has thus an important bearing on proof and procedure, and it is noteworthy that the question whether a promise is commercial or civil in character—an important issue in civil law systems—is conveniently expressed in terms of cause.

Apart from this, it is impossible to ignore the important practical consequences of the enlargement of the notion of cause by the courts. While writers have always been at pains to differentiate cause and motive (*causa remota*), judges have tended to confuse the two notions. This tendency is particularly marked where the motive of one of the parties to a contract is known to the other. Thus, actions brought to recover money lent to a gambler to enable him to gamble have been dismissed, although the receipt of the loan—which, according to the orthodox view, constitutes the cause of the borrower's obligation to repay—is neither unlawful nor immoral in itself.

When one remembers the remarkable evolution of other doctrines of French law, *e.g.* in the sphere of tort, under the pressure of changed circumstances and the stimulating influence of the courts, one may well wonder whether the doctrine of cause will remain what it largely is to-day—a jurisprudential truism. To adapt it to the needs of modern contract making is perhaps a sounder programme than to scrap it lock, stock and barrel. And that may be equally true of consideration. M. F. P. H.

The Privy Council on Renvoi.—It is impossible to exaggerate the importance of the decision of the Judicial Committee in *Jaber Elias Kotia* v. *Katr Bint Jiryes Nahas*[1], because it establishes, with all the weight of a considered judgment devoted to the issue, the true doctrine of *renvoi*.[2] The case was one where the deceased, who died intestate, was a national of the Lebanese State and domiciled therein, but owned certain *mulk* land in Palestine. The Succession Ordinance, 1923, of Palestine provided that in the case of such a person as the deceased "*mulk* land . . . . shall be distributed in accordance with the national law of the deceased," and that "where the national law imports the law of the domicile or the religious law or the law of the situation of an immovable, the law so imported shall be applied." The evidence given as to Lebanese Law, which was plainly the national law of the deceased, was that the Lebanese courts would apply the *lex situs* of the land, that is, the law of Palestine, which would give the widow of the deceased a half share in the land. The Supreme Court of Palestine accepted this view, which the Judicial Committee adopted after a critical investigation of the view taken by the District Court at Jaffa. That court adopted the view that the national law of the deceased must be taken to mean the law which the courts of the nationality of the deceased would apply to the intestate succession to land of their own nationals in their own country, which would give the widow only a quarter share. The usual argument of the *circulus inextricabilis* was adduced, the Lebanese law referring to the local law, that to national law and so *ad infinitum*. This contention was rejected by the Court which, following Scrutton, L.J., in *Casdagli* v. *Casdagli*,[3], Luxmoore, J., in *In re Ross*,[4] and Maugham, J., in "*In re Askew*,[5] stated the following principle: "In the English Courts phrases which refer to the national law of a propositus are *prima facie* to be construed not as referring to the law which the courts of that country would apply in the case of its own national domiciled in its own country in regard (where the situation of the property is relevant) to property in its own country, but to the law which the courts of that country would apply to the particular case of the propositus, having regard to what in their view is his domicile (if they consider

[1] 57 T.L.R. 619. [2] Dicey and Keith, *Conflict of Laws* (5th ed.), pp. 863 ff.
[3] 1918. P. 89 at p. 106, a dissenting judgment approved in the House of Lords, [1919] A.C. 145.
[4] [1930] 1 Ch. 377, rejecting the suggestion of Russell, J. *In re Annesley*, [1926] Ch. 692, at p. 708.
[5] [1930] 2 Ch. 259.

that to be relevant) and having regard to the situation of the property in question (if they consider that to be relevant)." This general doctrine was, they pointed out, accepted in the Succession Ordinance, which contemplated that the national law of a deceased might import the law of his domicile or the *lex situs* of an immovable. The *circulus* caused them no trouble; it was to be resolved, as Scrutton, L.J., had pointed out, by accepting the *renvoi* and by Palestinian courts adopting as the rule applicable the law affecting a citizen of Palestine, which gave the widow a half share.

This judgment ends many errors, such as the recent declaration[6] that "there is no clear-cut decision by a higher court which really establishes the doctrine in English law," or the claim that there is a "distinction between a reference by a conflict rule to the law of a country with a territorial system of law and a reference to a country with a personal system of law." Their Lordships cite *Casdagli* v. *Casdagli* on the same footing as the other cases, though in that case the country referred to had a personal system of law, while in the others the reference was to a country with a territorial system. It is important also that the Board called attention to the question, raised by Lord Maugham, of cases in which on grounds of public policy a court might refuse to accept the prescripts laid down by a foreign law, but pointed out that this issue was not involved in the present case.

One point only as regards *renvoi* is left undecided, as it did not present itself for consideration. It is a real difficulty in the law that, when a foreign law, *e.g.* that of Italy, refers to the law of nationality of a British subject, it is open to question what that law is. The latest decision, *In re O'Keefe*,[7] by Crossman, J., adopts the law of the domicile of origin; in that case the lady in question had long been domiciled in Italy, but had a domicile of origin in that part of Ireland which is now Eire. A like view was suggested *In re Johnson*[8] which was a case of a lady who died domiciled in Baden; the law of that State referred the succession to her national law, and the law of Malta, her domicile of origin, was adopted. In the cases *In re Ross* and *In re Askew* the domicile of origin was English, and English law was naturally enough applied as the national law. The Judicial Committee must be deemed to have approved the results achieved in these two cases, and it is probable that the logical conclusion thence is that *In re O'Keefe* was rightly decided. Certainly it is strained to present the view that the correct interpretation of the Italian reference to the national law is that, there being no national law of all British subjects, succession should be regulated by the law applicable to Italian subjects.[9] It then would follow that an Englishman's property would be dealt with by Italian law, while an Irish national's property would be regulated by the law of Eire, an indefensible state of things.

In the case of a Canadian national, it is obvious that in like manner the law applied should be the law of the province or territory of domicile, there being no federal authority to deal with the devolution of property. It must be remembered that English law definitely associates with a man his domicile of origin, as something which attaches to him indelibly, ready to revive if any other domicile is got rid of, and there is nothing odd in fixing on that character as deciding which form of British law is to be applied to a British national under the law of Italy, which provides for application of the national law in cases of succession.[10]

The alternative, of course, is to adopt the view that English law should be deemed the national law of British subjects, when national law is referred to by foreign law. In certain respects English law does apply to all British subjects; English criminal law is applicable to British ships in general, and in general English common law is applicable to matters taking place in such ships. Moreover, English law applies regularly in places where the Crown exercises extraterritorial jurisdiction, now by statute but originally no doubt by common law, and British subjects carry with them where they settle in unoccupied lands or lands with no civilized law, the law of England.[11] There seems, however, no reason to prefer this view to that taken by Crossman, J., in favour of the law of the domicile of origin. The question, however, remains open.

A. Berriedale Keith.

Labour in Poland.—The Polish Minister of Labour, Mr. Jan Stanczyk, has issued a pamphlet to show that for 20 years Poland has been active in carrying out the programme of legislation laid down by the International Labour Organization. In fact he maintains that upon some occasions the legislation of the country has anticipated the proposals which have received international sanction. The real test, however, as the Labour Organization has always recognized, is the extent to which national legislation receives enforcement. In that connexion it is deserving of notice that the pamphlet refers to the appointment of a Navigation Officer attached to the Maritime Office at Gdynia to ensure the application of the Maritime Conventions ratified by Poland. In this pamphlet there is a complete synopsis of the conventions and also laws applying them in relation to various subjects such as the employment

[6] Lorenzen, 50 *Yale, L.J.* 753. Cf. Falconbridge, 19 *Can. Bar. Rev.* 329.

[7] [1940] Ch. 124. [8] [1903] 1 Ch. 821. [9] Falconbridge, *op. cit.* pp. 323 ff.

[10] The purpose of Italian law is to apply foreign law to the case of a foreigner; its intention on this suggestion would be completely foiled, while accepting that form of foreign law which depends on domicile of origin secures the essential principle of Italian law.

[11] See Dicey and Keith, *op. cit.*, p. 741. These instances show that Pollock's view (25 L.Q.R. 157, adopted by Falconbridge, p. 324) that it is a fallacy to ascribe some kind of official predominance in the British Empire to English law, is over-stated.

of children and women, unemployment, compensation of accidents and occupational diseases, hours of work, holidays with pay, health insurance, etc. In laws relating to juvenile labour there is a provision to combat the exploitation of minors by employing them without wages under pretext of teaching them their work or training them in a trade, and also to forbid the practice of taking money from them, or their parents or guardians, as payment for training. The provisions in relation to the employment of women show that Poland has adopted some of the latest arrangements for their welfare as the pamphlet recalls that "all factories and workshops employing 100 or more women had to possess a creche for infants, and give all nursing mothers two half-hourly breaks in the working day to feed their children. These breaks were counted as part of the working day. Instead of creches there were welfare centres for mothers and children in many factories. There, each mother received a complete layette before the birth of her child. The children were under the constant care of the centre's nurses. All these facilities were supplied free of charge." The pamphlet concludes with a section describing the "destruction of social legislation by the Germans," which illustrates the extent of the attempt to break up the whole nation and to treat it merely as a subject race.

International Organization.—Mr. F. P. Walters devoted the Sidney Ball Lecture to a consideration of the Administrative Problems of International Organization (Oxford University Press, 1s.) and has produced a valuable contribution to an aspect of the League of Nations which rarely receives consideration. He is a convinced believer in the Covenant of the League of Nations as "not only a magnificent conception, but a perfectly sound and workable plan," and is equally satisfied that its main principles will prove to be the only ones which can be accepted and effectively applied at the end of this war. A good deal must depend upon the extent to which the governments are willing to spend money upon the organizations and his estimate is that from two to two and a half times as much as the average expenses of the last two and a half years will be necessary. Mr. Walters discusses the type of organization within each country which is most suitable to maintain the relationships with the centre at Geneva, and on the whole regards the Service Français de la Société des Nations as being the most efficient government organization for League affairs. As to the representation of governments he is opposed to the procedure by which permanent delegates, almost always professional diplomats, were called upon to act as representatives of their governments for matters quite outside their individual competence. "Especially in the case of distant countries," he states, "it was not uncommon to see the same man sitting successively on committees dealing with subjects such as railway transport, the opium traffic, or child welfare, for all of which he had no competence at all, as well as on bodies dealing with political questions, disarmament, and the like, which were his proper job. Such a practice was of course quite useless, indeed harmful, both for the committee and for the Government." On the other hand, Mr. Walters does not consider that the constitution of the International Labour Organization provides a suitable analogy for dealing with the economic questions, public health, social welfare and so on. The peculiar constitution of that organization, as he records, "sprang from a special cause, namely, the existence, in all industrial countries, of powerful and highly organized bodies representing the workers on the one hand and the employers on the other—a situation to which there is no sort of parallel in any other field; and secondly that its autonomy did not extend to questions of finance and staff, which were controlled by the Assembly for both bodies alike." Mr. Walters pays a tribute to the work of Sir Eric Drummond in boldly deciding to try from the first to organize his staff as an international civil service. To many, he adds, "his plan seemed Utopian at the time, but it worked, and though the conduct of individual officials exhibited certain variations, the Secretariat as a whole earned and deserved a reputation for loyalty and impartiality." In fact the conclusion to be drawn "from the twenty years' record of the Secretariat is that a genuinely international civil service is perfectly possible." To those who are concerned with the future of these international organizations upon which so much must depend for any favourable development of international relations, this lecture should not be missed on any account.

Judicial Efficiency.—The Chicago Bar Association circularized its members in order to ascertain their views as to the service which had been rendered by some of the judges of the Superior Court of Cook County whose names came up for re-election at the end of the year. Members of the Bar were invited to say against the name of each judge whether he observes court hours, is "diligent in the dispatch of business," is "patient and courteous," and is "attentive and fair minded." As the questionnaire proceeded the member of the Bar seemed to be called upon to become even more personal in his observations. The next question was "Does he possess legal ability?" followed by "Have you confidence in his integrity?" Finally the Bar was requested to say "Do you regard him as an able judge?" and wound up with the culminating question, "Should he be renominated?"

The Schuster Library.—Dr. Dickinson records in the Annual Report of the British Library of Political and Economic Science that arrangements have been made for some 150,000 volumes to be distributed in "reasonably safe country areas." Among the special collections which

have thus been sent out of London is the Schuster Library of Comparative Legislation. His report gives a graphic picture in miniature of the difficulties involved for large libraries under present conditions. It has been necessary, for example, for arrangements to be made with American libraries, institutions and publishing houses to hold for the Library until the successful conclusion of hostilities all periodicals and other material which would form part of the Library's normal additions. The Library of Congress has undertaken the care of all American federal and state documentation as well as material addressed to the School of Economics Library through the International Exchange Service of the Smithsonian Institution. Similar arrangements are also being made for material regularly received from Canada, Australia, India, South Africa, the Colonies and Dependencies, and foreign countries. Valuable cargo space will be saved in this way, and it is estimated that the normal monthly shipment of American official documents to the Library will release space sufficient for, say, two machine guns and two thousand rounds of small arms ammunition. Although for the time being this saves a certain amount of work for the Library staff, the conditions also add to it considerably since it is necessary to duplicate so much of the cataloguing, and recording work in order to provide against any damage which might be done by enemy action. Although there have been heavy bombs in the near neighbourhood, the Library has been fortunate to escape damage. The delayed-action bomb in a neighbouring building stopped work for four days. Apart from that, however, the total loss of time of the staff through delays and disorganization during the whole of the attacks on London between August 1, 1940, and July 31, 1941, only amounted to eleven "man-days," which is a remarkable record and is a fair illustration of the way in which services have been maintained in spite of difficulties and attacks.

Comparative Law in Scotland.—Apropos of Dr. Gutteridge's interesting article on *Comparative Law as a Factor in English Legal Education* in the last issue of the *Journal*, it may be of interest to know that the Scottish Law Agents Society recently appointed a "Foreign Land Laws Committee." It was considered that in view of the exceptional opportunities available at the present time the Council of that Society (which Society, incidentally, is proposing to alter its name to the "Scottish Law Society," the term "law Agent" having been now virtually superseded in Scotland by that of Solicitor), should appoint a Committee to procure information regarding the land laws of other countries, to such extent as might be reasonably possible, and to consider the same and report to the Council as to whether there were any modifications in the land laws of Scotland which might be suggested thereby. The Council were of opinion that in post-war reconstruction the knowledge of how land questions are dealt with in other countries might prove invaluable in surmounting the difficulties which are likely to be encountered. The term "foreign" used for convenience in the designation of the Committee is to be interpreted as meaning "furth" (*i.e.* outside) "of Scotland."

Whatever results may be achieved by this committee, it is encouraging to find this evidence of a practical realization of the importance and value of comparative law.

J. C. G.

Legal Pasigraphy.—"Therefore was the name of it called Babel; because the Lord did there confound the language of all the earth." What actual event, if any, is thus shadowed forth in the Babel legend, is never likely to be known, but the cramping effects of the absence of a universal literary language upon scientific progress will not be disputed. Some harbour a regret that the free and easy mediæval Latin could not have been left to develop, and not destroyed by the indignant return to classical standards which marked the Renaissance. Such regrets are now vain. Mathematics and Chemistry have instituted a system of symbols of universal comprehension which mitigates, though without wholly removing, the bane of diversity of tongues. In a paper read at a recent meeting of the American Bar Association, Professor Kocoureck (North Western University, Chicago) adumbrates a future in which a like system will be applied to legal science. "In law," says Professor Kocoureck, "there are only two fundamental legal relations; in their interaction they produce legal formulæ larger in number than those which have appeared so far in natural science. Every legal notion may be ultimately reduced to a legal relation (*a*) that which one may be legally bound to do for another; or (*b*) that which may be done against another with legal effect. It is possible to create symbols which abstractly represent all legal operations." It may be possible but whether it is worth while may be doubted. Law, like politics, religion, poetry, biology, has to take account in its administration and application of that indeterminate item, life, the vagaries and capacities of which formulæ seem hardly to fit. Moreover, even the introduction of formulæ only mitigates the difficulty of language. A symbolic language which is to cover the field of law would need to be capable of expressing much which cannot be tied up in a formula. As Professor Kocoureck remarks, "whatever may be the prospects . . . . much work and study will be required to obtain a practical solution."

F. M. G.

Overseas Subscriptions. Attention is drawn to the fact that the subscription for subscribers in Canada and the U.S.A. is now five dollars a year.

NOTICES OF BOOKS

CONCERNING ENGLISH ADMINISTRATIVE LAW.

ONLY a master of his subject could talk about Administrative Law[1] so engagingly as does Sir Cecil Carr in those six addresses which, as Carpentier Lecturer, he delivered at Columbia University in 1940. The Lectureship was founded to promote the study of the science of law by providing from time to time courses of lectures by authorities "chosen for pre-eminence, fitness and ability." These are exacting qualifications, but the fortunate audiences who listened to Sir Cecil Carr can have been left in no doubt that he possessed them in happy conjunction. Seldom have author and subject been better mated. Since 1923 Sir Cecil has been editor of the *Statutory Rules and Orders*, and in this capacity has had unrivalled opportunities of studying the modern growth of the vast jungle of delegated legislation. But he has not permitted his nature to be "subdued to what it works in like the dyer's hand," and we have no need to pity him and wish he were renewed. He has survived his devastating experiences with a literary style unspoilt and an enviable lucidity of exposition and aptness of quotation.

Sir Cecil is not blind to the defects and dangers of what we call administrative law. If he is more indulgent in his attitude to them than some recent robust critics, this is attributable in part to a natural mellowness of judgment and in part to the tolerance born of long familiarity. But he recognizes fully the urgency and the highly controversial character of the problems involved. The truth is that we are in the presence of a revolution in the theory and practice of government. Gone are the days when so stalwart a tribune of the people as Tom Paine could proclaim the doctrine that "the more perfect civilization is the less occasion has it for government." It is no doubt the case that the movement began over a century ago, when Edwin Chadwick was its first apostle, as is pointed out in the first of these lectures, but the pace has been enormously quickened of recent years. The cry in many quarters is for more and more government control, and every activity of the citizen is threatened with regimentation. What are called social measures are the legislative fashion of the day. The process has received an impetus in two successive world wars with their inevitable expansion of government control and management in every sphere. Hence the special value and interest of the third of these lectures, which deals with "Crisis Legislation."

The reason why this phenomenon has aroused so much controversy and anxiety is because it affects the fundamental conceptions of the Rule of Law—the very cause for the maintenance of which we are fighting. The need for a new technique of government is undeniable, and we are painfully evolving it by the truly British method of trial and error. Law has to be made, to be administered and to be interpreted. In the United States these three functions are expressly differentiated and separated in the Constitution. In this country, with our national dislike for hard and fast logic, we have been inclined to be less rigid in our demarcations. But on both sides of the Atlantic the problem is the same. If in the development of social legislation these lines of demarcation have to be shifted or redrawn, it is essential to ensure that we do not in the process lose sight of the vital principles of liberty and justice, for by their success in maintaining these principles all forms of government must ultimately be judged. Delegated legislation and administrative tribunals are the inevitable concomitant of the New Order, and both have their dangers. Legislation which escapes the salutary criticism of Parliament and tribunals which dispense with the publicity and traditions of fair dealing which are the safeguards of our courts of law, both need watching. In two of his lectures Sir Cecil deals judiciously with these aspects of administrative law. To the quotations with which they are adorned may be added the following apposite passage from Lecky's "Thoughts on History," first published many years ago in *The Forum*, the well-known American review:

> "Laws regulating private enterprises, substituting State control or initiative for individual action, encouraging or discouraging thrift, and above all interfering with free contracts, have much more than an immediate influence, for they become the prolific parents of many further extensions. In the words of an excellent observer, it will be found 'that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding.' It is by studying such tendencies through long periods of time that their good or evil influences may be best discovered, and this should be one of the great tasks of the historian."

[1] *Concerning English Administrative Law.* By Sir Cecil Thomas Carr. (London: Oxford University Press, 1941. Pp. xii+189. 10/6

Speaking as he was in the United States, where the legal climate is more favourable to luxuriant growths, Sir Cecil had necessarily as a "guest artist"—to borrow a phrase from the B.B.C.—to tread warily for his topic has aroused strong passions there. How strong may be gauged from the powerful indictment by Dean Pound, which appeared in the November issue of the *Journal of the American Bar Association*. But with his usual tact he has stepped unscorched over the embers beneath.

The lecture on The Written Laws is an agreeable aside from the main theme, and discourses informatively and entertainingly on the art and science of legislation. The series concludes with some wise and good-natured observations on Bureaucracy and its ways.

The vicissitudes of the times have delayed the publication of these lectures in this country, but they are now available to English readers.

M.

CITY MANAGER GOVERNMENT.

THE purpose of this work[1] is to make a review and appraisal of the results of twenty-five years of municipal government under the city-manager system in some fifty "typical" United States cities. It is a record of remarkable progress in efficiency, a development achieved in face of factions, cliques, patronage, vested business interests and the notorious spoils system, which perennially shook to its foundations the whole city administration, from the heads of its departments to the sweepers of its streets. Local government had for generations been under the control of local party organizations, which were primarily concerned with keeping themselves in power and were not averse from employing public offices and public money for their purposes. The most influential citizens, occupied with their own business affairs, looked upon municipal politics as a disreputable game, unworthy of their attention, although they made use of the party machine when they felt it in their interest to do so. The frequent and wholesale changes in the personnel of the administration made the development of a career system impossible and led to widespread inefficiency and corruption. Mayors and councillors, when elected, occupied themselves mainly in the task of strengthening their grip and in political manœuvre, and paid scant and ineffective attention to the problems of administration. Few of them had any experience or capacity for management.

The system, notorious as it had been since the last decades of the nineteenth century, had its origin in what appeared, in national politics, to be a sound democratic principle—the principle of checks and balances. The analogy, of course, was false, for it overlooked the cardinal distinction between national and local government, namely, that national government is concerned with a self-contained economy, an international entity with rights and duties towards its co-equal partners in international society, while the local body, being politically dependent, is only a part of that system to whose protection and strength it owes its existence and well-being.

Social reformers, among them James Bryce, one-time British Ambassador to the United States, came to recognize the falsity of the analogy, and the absurdity—not to speak of the tragedy—of the spectacle of this political play-acting on hundreds of local stages. They recognized that reform, efficiency and integrity could only be secured by adopting the methods of private business organization. They abandoned the idea of separation of powers and aimed to concentrate all authority in a single small governing body, who would be the only elected officials and who would appoint a business manager with administrative powers and a certain measure of freedom in the choice of his executive officers. The progress of the revolutionary concept, which is traced in this work with extraordinary thoroughness and attention to detail, has itself been revolutionary. Several hundreds of the leading United States cities have adopted the plan, which has weakened the influence of patronage, brought into office administrators of far greater prestige than those who served before, effected remarkable economies and, in many cases, enabled the city administration to engage in public works and schemes of social reform never before attempted.

The new system has, of course, not been without its critics. There were those who feared that the supercession of the faction might result in the control of the bureaucrat; others who were jealous of the prominence of the expert manager, and sought to reduce him to the pattern of an anonymous civil servant. But, as is demonstrated by the authors, "the extent of the success of the system in each city depends upon the community's acceptance of its general purpose and of its fundamental political ideas—the purpose that the city government should devote its energies more effectively in getting its work done, and the ideas that it would do so if the city elected its best leaders on a non-partisan basis, if the council delegated administrative authority to an efficient city manager, and if all concerned respected the distinction between politics and administration."

Some interesting experiments in this new form of local government have been undertaken in Ireland, mentioned in passing by the authors. The complacent inefficiency of the former

[1] *City Manager Government in the United States*. By Harold A. Stone, Don K. Price and Kathryn H. Stone. Published for the Committee on Public Administration of the Social Science Research Council by "Public Administration Service." Chicago, 1940. Pp. xvi, 279.

Dublin Corporation led, in 1923, to its abolition by the new Irish Free State Government. For seven years the city administration was in the expert hands of three Commissioners, until at length it was found that the ancient civic dignities could safely be restored, in form, at any rate. By the Local Government (Dublin) Act, 1930, provision was made for an elected Lord Mayor and Council. Administrative functions were entrusted to a "City Manager and Town Clerk," who was given control over the appointment and removal of officers and servants of the Corporation, and entrusted with all duties save what might be called legislative functions, —namely, the making of the rate, of by-laws, and of statutory orders—and the disposition of Corporation land. In regard to these "reserved functions," it is the duty of the City Manager to advise the Council as to their exercise. A striking departure from the American model is the method of appointing this administrative official. The Council is empowered to nominate candidates for the office, but no candidate may be elected who has not been approved and recommended by a statutory, Government-appointed body, known as the Local Appointments Commissioners, which virtually controls all important posts under local public bodies.

The Manager is completely independent of the Council in the discharge of his duties. He has, in addition, the right to attend and take part in the discussions at meetings of the Council, but not to vote. His appointment is normally for life, and he can be removed by a majority vote of the Council only with the consent of the Minister for Local Government, at whose sole discretion his remuneration, paid by the Corporation, is fixed. The Dublin City Manager has not the anonymity to which even an important civil servant is subjected. The first City Manager, Mr. Gerald J. Sherlock, was expressly nominated by Act of Parliament, and he and his successor, Mr. Henson, have proved themselves, not merely able administrators, but an invaluable check to the amateurism of the Councillors. The borough of Dun Laoghaire (Kingstown) and the cities of Limerick and Waterford, have also Government-appointed City Managers. Despite the initial indignity of having an official imposed upon them, the Councillors have wisely accepted the new order, and relations between Manager and Council have been harmonious in every case. The necessity for some such interference in local government has long been apparent, and commands general support. The change in Dublin and Dun Laoghaire was sponsored by the Cosgrave administration, and that in Limerick and Waterford by the de Valera régime. Side by side with it has come the dissolution of many county and urban councils, and their replacement by Government-appointed Commissioners, where public inquiries have revealed inefficiency and favouritism.

The authors have elaborated their theme with that painstaking and meticulous analysis which is so distinctive a feature of American scholarship.

V. G.

OLD AGE PENSIONS.

At the risk of perpetrating a cliché it must be said that the volume by Sir Arnold Wilson and Mr. Mackay[1] is one which no student of Old Age Pensions can do without, for it is easily the most complete work on the subject. Two omissions only fall to be noted. Something should have been said of the heroic work of Frederick Rogers, who for years devoted himself to Old Age Pensions, but the second may have easily escaped the notice of the authors. A long time ago an anonymous writer propounded a scheme whereby, on the registration of the birth of a child, the parent would be handed a card already stamped with a small contribution from the State. The parent would add stamps every week or month, the value increasing as the child reached workable age, and the scheme was to produce a fair pension at the age of 65. For the rest, the authors seem to have explained everything. After a half chaffing reference to those savage tribes who disposed of the old age pension problem by disposing of the aged themselves, they show that from the earliest times of civilization society has recognized a moral, though not always a practical, obligation to care for the aged needy, and in this connexion it will come as a surprise to those readers who are admirers of Macaulay to know that Charles the First, Laud and Wentworth devised schemes to help the aged poor, and that it was Cromwell and the Parliament who neglected them. The book is called an historical and critical survey, but the criticism is mainly a lament that for so long nothing was done in this country. We come across this kind of remark time after time—"One Royal Commission succeeded another . . . . but nothing happened or was intended to happen." Plenty of evidence is adduced and the opponents of old age pensions were at once a motley and powerful crowd. Stern individualists saw the morale of the sturdy working class undermined. Bishops opposed the idea as something almost sacriligious. Bankers fought against any scheme, though what they were doing in the opposition galley is not clear, while the friendly societies and the major trade unions were also enemies. It is hard to forgive the last two. The friendly societies did not scruple to give evidence on the matter, which it is charitable to call misleading, for in face of the published facts that their administrative expenses were 40, 50 and even 60 per cent. of the subscriptions, they maintained

[1] *Old Age Pensions.* By Sir Arnold Wilson, M.P., and G. S. Mackay. (Oxford University Press: Humphrey Milford, London.) Pp. xx, 238. 16*s*.

that they were cheaply administered, and although scores of them went bankrupt every year, they maintained that they were both honest and solvent.

As ever, the working classes were their own worst enemies, but they can be forgiven. To them old age pensions were part of the poor law ; indeed, the earlier schemes were intended to be linked up with the rates and to the poor the law was anathema. True, the poor law system was not what it was ; Bumble and his kind were no more, but they were not forgotten, and as Henry Fawcett said, " The resentment of an injustice lingers long after the injustice has been removed."

Then arose two great men, Canon Blackley and Joseph Chamberlain, of whom the book says they " died in faith, not having received the promises, but having seen them afar off."

We have no space to describe all their work, but it may be summarized as saying that general thrift and independence can only be organized on a compulsory basis, that a contributory scheme is better than a non-contributory one, and that it was turgid nonsense to attribute poverty in old age solely to drink and extravagance. Joseph Chamberlain poured scorn on the last argument in speeches which may be described as reasoning evidence and scathing invective. On the second point there can be no doubt that in the long run a contributory scheme is better than a non-contributory scheme, owing mainly to a fact in human nature. In a non-contributory scheme the payer always thinks he is paying too much ; the payee that he is receiving too little ; but a contributory scheme is not as a rule open to these objections, and, where it is, the matter can be put right. More commissions, more reports, but they produced no pensions. Then a committee was appointed of which Mr. Lloyd George was a member and one of its first acts was to refuse to consider any scheme of compulsory contributions. Why committees so often exclude important matters from their purview must be left to the student of lunacy, but in this case it should be admitted that popular feeling was against contributions.

At last the first Old Age Pension Bill was presented in 1908 and Mr. Lloyd George paid a handsome tribute to his old enemy, Joseph Chamberlain. Since then the two great changes which have taken place are the raising of the maximum from 5 to 10 shillings a week and the partial introduction of the contributory principle in 1925-26.

The readers of this Journal will be particularly interested in overseas pension schemes. Denmark instituted a scheme free from poor law taint as far back as 1891, and Bismarck, in Germany, also brought a contributory scheme into force in the same year. Belgium, indeed, had moved in 1861, and the book gives a list of 23 countries, other than our own, which have instituted compulsory insurance for old age pensions.

Here this inadequate review must end with a repetition of the opening statement that every student of poverty in old age should read the book.

G. H. Stuart Bunning.

ADVISORY BODIES.

The Oxford University Politics Research Group has produced an important volume[1] on the departmental use of advisory councils and committees. Separate hands analyse the results in nine different branches of government. Sir Arthur Salter writes a wise preface, Dr. Nicholas Mansergh a foreword, and Mr. R. V. Vernon an introduction and conclusion. The authors seem to go less far than the publishers' notice in claiming that advisory bodies are a new administrative technique, " one of the most far-reaching of recent developments " in the machinery of democracy. In the reconstruction phase of 1918 the Haldane Committee on the Machinery of Government demanded the organized acquisition of facts and information and the systematic application of thought before settling policy and administration. It advocated advisory committees to secure and retain public confidence ; they would draw counsel and help from the knowledge and experience of all sections of the community. This was not entirely novel. Taylor's little book *The Statesman* asked for a planning staff a hundred years ago. The Haldane Committee already knew the bodies which thought and advised upon defence, health and education, and medical and scientific research, the Consumers' Council of the Ministry of Food and older agencies like the Public Works Loan Commissioners. Historical analogies are plentiful. Although past centuries have had recourse to corporate activity and to *ad hoc* commissioners rather than to advisory groups as such, the great reforms of public health, the poor law and the police, in the eighteen-thirties and after, were duly proceeded by the organized acquisition of facts and the systematic application of thought. The persistent intrusion of government into new fields doubtless multiplies the occasions for inviting extrinsic advisers to enlighten and correct the bureaucrat. The official Index to the Statutes in Force gives some fifty cross-references under its heading " Advisory and Consultative Councils and Committees." Non-statutory instances will be not less numerous. Financial stringency may periodically cut down research and planning. The stress of war has caused Defence Regulations to dissolve the Livestock Commission and Advisory Committee and to suspend the White Fish Commission and Herring Industry Advisory Council ; an emergency

[1] *Advisory Bodies*, a Study of their Uses in Relation to Central Government 1919–1939 : edited by R. V. Vernon and Dr. N. Mansergh. (London : Allen & Unwin.) 18s.

statute has allowed the Treasury to dispense with recommendations from the Import Duties Advisory Committee which has contributed a notable impartiality and science to the imposing of protectionist taxation. On the other hand the war has introduced new consultative bodies, including the advisory committee which examines detention cases under Regulation 18B, like that which dealt with internment under Regulation 14B in the last war. A supplementary tribunal with quasi-judicial functions lies, perhaps, outside the scope of the present study.

We need not linger over questions whether a conference of M.P.s (like that which discussed the reform of the Second Chamber in 1917), or a Royal Commission or a committee of inquiry can truly be called an advisory body. Sir Arthur Salter is content to classify the various groups according to their legislative or administrative concernment. The legislative is the aspect which primarily interests the Society of Comparative Legislation. Our annual summaries of United Kingdom statutes have repeatedly ascribed the genesis of a law to the report of a Royal Commission or departmental committee. The process is not always swift. The prospects of early action are brightest when these bodies include an official draftsman and when a draft Bill can accompany their conclusions. The skilfully drawn Pharmacy and Poisons Act of 1933 was the Bill produced by the departmental committee of 1930. The great codes of local government (1933), public health (1936) and food and drugs (1937) grew out of the Bills framed along with the reports of the Local Government and Public Health Law Consolidation Committee. Drafting clarifies political and legislative aims. There is all the difference between abstract recommendations and a concrete set of workable clauses ready for second reading to-morrow. True, an exploratory committee's Bill is sometimes pigeon-holed. The Crown Proceedings Bill had only partial success. The vast Income Tax Bill may almost be deemed a waste of effort unless Parliamentary progress can be made ; already it needs re-drafting to cover subsequent changes made by six or seven more Finance Acts. Committee's suggestions must bide their time ; controversy often lurks behind seemingly innocent proposals.

The nine authors are not afraid to generalize about the advisory body. What size should it be ? Mr. Angus Mackintosh, writing of the Ministry of Agriculture, hints that its Sugar Industry Committee was too small (the three members divided two to one), while the Royal Commission on the economic aspects of the agricultural industry (with 22 members) was too big—the Ministry " dissuaded it from completing its labours." In his view the Council of Agriculture for England, set up under the 1919 Act (with about 150 members) was much too unwieldy to formulate policy ; " moves in the realm of policy must often be secret " ; to try to make the body exhaustively representative was not worth while ; big bodies, moreover, cannot meet frequently. Perhaps the advisory groups work best when they have a clearly defined taste. Mr. R. N. Spann, who deals with the Ministry of Health, declares that the Council on General Health Questions was a dead letter from the beginning. He thinks that the Ministry, with its " innate conservation," was more ready than the Board of Education to regard its consultative councils as " artificial creations preventing the permanent officials from getting on with their work." The criticism seems over-simplified—like his colleagues' statements elsewhere that " the growth of delegated legislation has resulted in the execution of judicial functions by administrative bodies " (p. 74) and that the chairman of the Macmillan Committee on Finance and Industry was " a lawyer but formerly an engineer " (p. 109). A first-rate chairman, by the way, is an indispensable element ; so is a good secretary ; so is a wise choice of members who are not fanatics with already fixed opinions. A unanimous report is to be desired, even at the price of compromise. Ought a department to accept its own committee's recommendations ? Sir Arthur Salter would regard it as a reproach if, after the committee has performed the task entrusted to it, the department should decide that either itself or some other persons were better qualified to decide the same issue. Sometimes the terms of reference may indicate the conclusions required. The Sugar Industry Committee is said to have disappointed the Ministry of Agriculture. Sometimes the child surprises its parents. Mr. Spann says that the Committee on Nutrition was meant to give technical guidance on such matters as institutional dietaries and to instruct the shopping public, but it " became the arbiter in complicated questions involving the whole social policy of the Government." Its conclusions had to compete (and be reconciled) with those of the less official but hardly less authoritative committee of the British Medical Association. Part of the purpose of these bodies' reports is to interest and instruct the public ; but what if the public will not study the reports ? Mr. John Graves thinks that the Board of Education had better recruit a fully-trained whole-time journalist and a fully-trained publisher with large-scale experience of editing, producing and advertising educational works ; if these and other suggestions failed to stimulate the sales of the Board's publications, he would send a traveller to canvass the schools for orders.

There is no chapter on the Lord Chancellor's use of advisory committees. Carefully chosen experts assist him, permanently or otherwise, in procedural matters, in the revision of the common law and the statute book and in the business of the courts. The standing committees on justices of the peace and the occasional committees on such varied topics as dormant funds, the coercion of wives, legal aid for the poor, the Public Trustee and divorce at assizes deserve the attention of students of the administration of justice. Notwithstanding any omissions, however, the book is full of information on a subject of considerable political

significance. Sir Arthur Salter begins his preface with the claim that the proper use of advisory bodies is the right answer of representative democracy to the challenge of the Corporative State. In the latter the "functional" bodies represent specialized occupations, but, being chosen or created by the dictator, impair what Britain regards as adequate democratic participation in the tasks of self-government. Possibly the chief constitutional problem of our advisory bodies is the maintenance of the principle of ministerial responsibility. The Haldane Committee stressed this point in 1918. It mentioned, nevertheless, the proposal to saddle departments with supervisory Standing Committees consisting of members of Parliament empowered to send for papers and require the Minister to attend and explain or defend himself. Is not the example of the French *commissions* discouraging? What sort of Minister will take office under those conditions? And what will be their effect on administrators who are already accused of lacking initiative? The Haldane Committee believed that, if this plan were tried and if Parliament better understood the work of a department, the official might find himself concentrating on constructive work rather than on the anticipation of opposition. He might, or he might not. Any misgivings which arise over advisory bodies in the administrative field must not be exaggerated. In the legislative field admiration for these bodies is unqualified.

C. T. C.

THE INTERNATIONAL LABOUR CODE

The International Labour Organization have embodied resolutions passed by the various conferences in the course of twenty years in the form of a Code [1] providing a systematic presentation of the obligations and standards relating to social policy which have been evolved under its auspices. They have been approved after the most thorough and prolonged investigation and discussion by a world industrial parliament representative of governments, employers and workers. There is no doubt that during the past two decades they have had an important effect upon the development of social legislation in many countries. The presentation of these conclusions in the form of a systematic code may contribute in no small measure to action by the nations when they are more free to give attention to these matters, though at the same time it must be recognized that many of them cannot wait and are not waiting until there is a cessation of belligerent activities. The form of a code enables the various documents to be provided in a simple arrangement, so that they are not overburdened with preambles and protocolary provisions, which are of little or no importance in determining the standards established by the actual resolutions.

The standards of policy embodied in the International Labour Code possess the unique prestige of having been approved by a two-thirds majority in a world industrial parliament. They are of two distinct types: namely, conventions and recommendations. Conventions are designed to be obligation-creating instruments: Recommendations (Mr. C. Wilfred Jenks, the Legal Adviser of the International Labour Office, explains in a preface) "are not designed for the creation of obligations but are exclusively standard-defining instruments; they are 'to be submitted to the Members for consideration' with a view to effect being given to them 'by national legislation or otherwise'." Conventions are not binding *per se* since the Members of the International Labour Organization only incur an obligation to apply the provisions of a convention when they have become parties to it by ratification. Accordingly the status of a convention in relation to a Member which has not put it into force is analogous to that of a recommendation.

Many of the conventions embodied in the Code have been ratified on a substantial scale, although it has to be recognized that there may be a considerable lapse of time before a convention has received ratification on a wide scale. Of the 46 conventions which were in force on 1st September, 1939, 28 had been ratified by 15 or more Members and of these 28, 21 had been ratified by 20 or more Members and 10 by 30 or more Members. "There was thus," as Mr. Jenks points out, "in existence at the outbreak of war a far-flung though highly uneven network of international obligations in respect of labour and social questions. . . . Gradually but surely international standards of labour and social policy were being built up, and international obligations to maintain these standards were being increasingly accepted by the Members of the International Labour Organization."

The comprehensive character of the subjects covered by the Code can be gathered from the mere recital of the twelve books into which it is divided. They are as follows: Employment and Unemployment, General Conditions of Employment, The Employment of Children and Young Persons, The Employment of Women, Social Insurance, Industrial Relations, The Administration of Social Legislation, The International Seamen's Code, Standards of Colonial Labour Policy, Migration and Statistics and other information. The appendices provide valuable material to show the directions in which the Organization has been working in order to advance the standards, and to supplement, by widening their scope, the conventions which have received approval. They include the texts of important conferences such as that at Havana in 1939 dealing with the Inter-American Social Insurance Code,

[1] *The International Labour Code.* 1919–1939. Framed by the International Labour Organization. (Montreal International Labour Office.) Pp. lvi, 920.

which has been adopted as the basis of the work of the Inter-American Social Security Committee established by resolutions and declarations signed at Lima on 20th December, 1940.

The publication of a volume of this kind is of inestimable value in furthering the objects which the Organization has in view and cannot fail to be of considerable importance in stimulating action and facilitating discussions in the problems which lie before the Allied nations. Mr. C. Wilfred Jenks is to be congratulated upon the thoroughness and ability with which he has accomplished a difficult undertaking and deserves the grateful thanks of all who, whether official or unofficial, are concerned with the important work of the International Labour Organization. In fact, it may be said that there is hardly anyone who in some way or another is not concerned with the proposals set forth in this volume. It may even be a matter for consideration in view of the importance of educating public opinion, to which the Organization is fully alive, that it would be worth while to present in a condensed form some narrative of the conclusions and recommendations which are generally applicable to the individual citizens. In the meantime the volume itself can be cordially recommended to those who are anxious to see the social clauses of the Atlantic Charter put into operation not merely in Great Britain, the Dominions and the United States, but also in India and the Colonies, and in due course in the allied countries upon the restoration of their national lives.

C. E. A. B.

GOVERNMENT IN WAR TIME EUROPE

Government in War Time Europe [1] is a collection of studies prepared for the use of students in university courses in the United States dealing with European governments and current European politics. The difficulties in preparing such studies at the present time are recognized by the editors, but if this limitation is appreciated the book is a useful and interesting commentary on the changing political scene in Europe. The studies deal with government and policy in war time England, the effects of the war on the government of Germany, Russia, Italy, France and the Balkan and Scandinavian countries. There is little in the section on England which is unfamiliar to the English reader, and it may be thought that the contributors have confined themselves too strictly to the work of analysis, though the section also contains some interesting criticism of government policy, *e.g.* on education, the railway agreement, etc. Professor Marx in his survey of the effects of war on the government of Germany makes the interesting point that the influence and authority of the National Socialist Party has declined, whilst that of the Civil Service has correspondingly increased. He also points out that the relations of the government with religious organizations have become easier as the war progresses. From the chapters on Russia we learn that the Army has been freed to some extent from the control of political commissars, but the influence of the Communist Party has nevertheless not been substantially affected. The section on Russia will, however, require considerable revision, as a result of the outbreak of war between that country and Germany ; for at the time this book was written Russia was still " neutral." Professor Ebenstein, who contributes a chapter on the impact of the war on Italian Fascism, stresses the exhaustion felt in Italy before she even entered the war, the widening of the gap between the régime and the people, the curiously " soft " policy adopted towards Italy by the Western Allies between 3rd September, 1939, and her entry into the war (the statement appears in this book that " the British and French governments actually permitted British and French factories to accept Italian orders amounting to 240 million dollars," but no authority is cited). The now well-known divisions in the Fascist Party and the economic distress in Italy are also emphasized. Professor Heinburg deals with French government under Petain. His theory generally speaking is that the substance of French law and government has changed but little under the Petain régime. He is of the opinion that the constitutional changes effected by the Vichy government are not necessarily a consequence of the German victory over France, but rather a " war-spurred modification initially introduced by an internal trend " towards a stronger executive—an internal trend already in existence before the war began. He admits, however, that the general curtailment of popular elections in 2,722 cities with over 2,000 inhabitants has had the effect of considerably strengthening " Rightist political strength."

Students of international relations will find this book a valuable and stimulating account of war time government in Europe. The tale, however, is not yet finished.

J. M. J.

INTERNATIONAL LAW CASES.

NOTWITHSTANDING obvious difficulties, Professor Lauterpacht has managed to produce another volume of the series of the *Annual Digest and Reports of Public International Law Cases.* [2] The reports of cases decided in enemy and occupied countries have been compiled from material available in England. We are told that Professor Verzijl, whose contribution was sent off

[1] *Government in War Time Europe.* Edited by Harold Zink and Taylor Cole. (Reynal and Hitchcock : New York). Pp. x, 249. 2 dollars.

[2] *Annual Digest and Reports of Public International Law Cases.* 1935–1937. Edited by H. Lauterpacht. (London : Butterworth & Co., Ltd.) Pp. xlix, 514. 50s.

just before the invasion of Holland, has been interned. All readers of the *Journal* will share the editor's hope that this very distinguished scholar may be released.

The new volume indicates some changes in the general character of the series. In the troubled years which it records the authority of international institutions was rapidly weakening, and the decisions of international tribunals occupy a relatively small part of the book. The Permanent Court is represented by only five cases, none of them of the first order of interest or importance. Half a dozen awards upon private claims of various kinds make up the rest of the international decisions, except for the absurd finding of the Commission set up to report on the " Walwal Incident " of 1935.

The balance of the work has thus been shifted, and nearly all the decisions digested or reported are now those of national courts. The change of balance also affects the subject-matter of the cases. Indeed, there is some danger that the title of the book may become misleading. Of " public international law " in the strict sense of the law governing inter-state relations there is now relatively little. A large number of the decisions selected are really upon questions of private international law. Many others, particularly those on such subjects as nationality, naturalization, and the rights of aliens, are decisions upon purely municipal statutes and are only included because they affect the nationals of more than one State.

Only five cases are reported under the heading " War and Neutrality," and all of these arise out of the war of 1914-18. The troubles of the present time are foreshadowed by a rich crop of decisions arising out of the Spanish Civil War, while other cases illustrate the problems which the barbarous legislation of the Nazi régime has created for more civilized countries. It is generally true to say that the decisions of the various national courts reflect the political tendencies of their respective governments.

A study of the volume as a whole is indeed somewhat depressing, but it is the business of the editor to present his material as he finds it. Professor Lauterpacht and his colleagues are to be congratulated upon the scholarship and industry which have enabled them to produce this work under such difficult and discouraging conditions.

H. A. Smith.

ARBITRATION IN ACTION

Arbitration in Action, by Frances Kellor,[1] is mainly of interest to lawyers and commercial and industrial firms in the United States. It sets out in somewhat lengthy, but none the less convenient, form the principles and purposes of commercial and labour arbitrations as worked out, after careful thought and much practical experience, by the American Arbitration Association. It also contains a useful summary of all the Statutes of the separate States of the Union governing arbitration (contributed by Professor Wesley A. Sturges, of Yale). Internationally its practical interest is confined to the Americas, by setting out the Inter-American System of Arbitration, operating in all North and South American States since their 7th International Conference in 1933. The author is particularly qualified to deal with this development of international arbitration as he is the Vice-President of the American Arbitration Association, which, in collaboration with the Council on Inter-American Relations (dissolved in 1936), framed the System and Standard Rules of Procedure. The book, therefore, is of considerable theoretical value to those in any other country who are interested in establishing a system of international arbitration ; for the American system is a live one. By way of practice in the international sphere on this side of the world we had, in pre-war times, the Court of Arbitration of the International Chamber of Commerce, and more local, but in some respects more world wide, we had the London and other Chambers of Commerce and Exchanges with their individual schemes for arbitration of commercial disputes. By way of theory we had the Rome Draft (drawn up by the Committee of Experts appointed in 1933 by the Governing Board of the International Institute at Rome for the Unification of Private Law, and submitted by the Institute to the League of Nations in 1938) and the two sets of Draft Rules for the Amsterdam Conference of the International Law Association, one by the Association's Commercial Arbitration Committee and the other by its French Sub-Committee. It would seem, therefore, that the advancement of international arbitration was very much to the fore in pre-war days and, one may hope, will be taken up again when the wars are over. From this angle the book under review should be extremely valuable.

The author might perhaps have referred to the plan, adopted by the International Chamber of Commerce at its 10th Congress at Copenhagen in 1939 and, presumably, by the American Arbitration Association, for collaboration between these two bodies in the field of arbitration. Although this extension of international co-operation has not had time to get going it is a step in a right direction, and worth mention in a book so closely concerned as this is with the acts and deeds of the American Arbitration Association.

For those who like and use summaries of principles and rules we can recommend the " ethical standards " (page 30), the functions of the arbitrator's clerk (page 45), hints for the draftsman of arbitration clauses (page 75) and of rules (page 96), hints for the Award, (page 129), and grounds for contesting an Award (page 168).

J. E. James.

[1] *Arbitration in Action.* By Frances Kellor. (New York: Harper.) Pp. x, 412. $3.50.

NATIVE LAW IN SOUTH AFRICA.[1]

"ALTHOUGH," writes Mr. Lewin, "accurate information on almost every aspect of Bantu life has been accumulating at a rapid rate in the last twenty years, it is a remarkable fact that even to-day the customary law of most tribes remains wholly unrecorded." Lord Hailey has called attention, in the *African Survey*, to the same lacuna. Here is a rich field for the comparative lawyer and the student of primitive jurisprudence, as distinct from the anthropologist, who, as Mr. Lewin points out, does not always sufficiently distinguish between operative customary law and mere social usage and ceremonial. Those who administer the "recognized" law in the Native Courts of South Africa have to depend on four main sources: (1) the reports of various Commissions, dating from 1852; (2) a very limited number of textbooks and monographs, of which the most recent is Professor Schapera's *Handbook of Tswana Law and Custom*; (3) a few series of official reports which, however, are difficult to come by and are not supplemented by any Digest; (4) the judge's own knowledge of native law and custom. Mr. Lewin pleads for a more systematic study and arrangement of these tribal systems from the point of view of sociological jurisprudence, and for a Restatement of Native Law (not, however, a Code, which, like the Natal Code of 1891, might have an ossifying effect on developing institutions). He calls attention to some of the major problems of Native Law which have not yet been settled, especially in the field of Conflict of Laws, and blazes a trail for the future investigator with an excellent bibliography. This is to be followed by a work, which should be of great interest to comparative lawyers, from Mr. Lewin's own pen, on the problems of Native Law. Pending this fuller study, the article at present under review provides a most valuable blue-print of a difficult but fascinating task for the student of the *esprit des lois*.

C. K. A.

The following publications have also been received:[2]

Barbados: *Proclamations, Orders and Regulations*, 1940. Edited by E. C. Dear. (Advocate Co., Ltd., Government Printer, Barbados). Pp. 416.

Domke, Dr. Martin, "*International Aspects of European Expropriation Measures.*" Address delivered before the American Foreign Law Association, New York.

Gibraltar: 1941 *Supplement to the Laws of Gibraltar*. Prepared by C. Mansel Reece, Esq., K.C. (Gibraltar Garrison Library Committee.) Pp. xlv, 443. 21*s*.

India: *The Code of Criminal Procedure*, 1898 (*Act V of* 1898) as modified up to 1st Nov., 1940. (Government of India, Legislative Dept., Delhi.) Pp. ix, 413. 2*s*. 3*d*.

Table Showing Effect of Legislation by the Central Legislature and by the Governor General during 1940. (Government of India, Legislative Dept., Delhi.) Pp. 102. 2*s*. 6*d*.

Legislation and Orders Relating to the War, Vols. I and II. (Government of India, Legislative Dept., Delhi.) Pp. v, 308 and 595. 5*s*. 3*d*. and 8*s*. 6*d*.

It has been found necessary to issue a second edition of this publication, which has been compiled on the same lines. For general convenience of reference, however, it has been issued in two volumes. The first contains the Acts, Ordinances and Proclamations, while the second is devoted to the Orders and Rules under them.

International Legislation. Vol. VII, 1935–37, Nos. 402–505. Edited by Manley O. Hudson. (Columbia University Press, Carnegie Endowment for International Peace, Washington.) Pp. xlx, 1026. $4.00.

The seventh volume of this collection of texts, which is edited by Judge Manley O. Hudson, contains 140 principal instruments dealing with a wide range of subjects, of which some had not previously been included in legislation in this way. During the years 1935, 1936 and 1937 it is noticeable that labour and radio communications are important matters receiving attention. A third of the volume is occupied with documents relating to communications and transport. The documents are published in the original language with an official translation. Each is preceded by an editorial note and to many of them are attached bibliographies. The volume has a particular value at the present time as showing the international agreements which had been just adopted before the impact of war diverted action into another channel and so has given us the Atlantic Charter and a number of other similar agreements.

[1] *A Short Survey of Native Law in South Africa*. By Julius Lewin. Reprinted from *Bantu Studies*, June, 1941.

[2] Mention here does not preclude review later.

Journal of the Parliaments of the Empire. Vol. XXII, No. 4. Empire Parliamentary Association, London.

The Empire Parliamentary Association are continuing the publication of their Journal, which summarizes the records of the proceedings of the Parliaments of the Empire. The last number contains the debates and official pronouncements at Westminster as well as a selection from the parliamentary sessions in Australia and New Zealand. Some of the colonies not possessing responsible government have had debates during the period under review which seems to end about the end of October, 1941, and the number concludes with a debate in the Legislative Council of Jamaica, where the subject of constitutional changes is once again an active issue. Jamaica possesses a long history on this subject, of which a portion was given by Mr. Ronald V. Sires in a recent issue of the *Journal* (see Third Series, Vol. XXII, p. 178). In the course of moving an amendment to the Government's proposals, the Hon. J. A. G. Smith asked why Jamaica should have a constitution inferior to the constitutions of Bermuda, Barbados and Bahamas, and referred to the island's importance, revenue and population as compared with those colonies. The main appeal is a request for representative government. The official proposals were negatived without a division, and Mr. Smith's motion adhering to the proposals put forward by the Legislative Council in June, 1939, was agreed to by 11 votes against 3, while one member refrained from voting.

Khaddhuri, Majid. *The Law of War and Peace in Islam.* (London : Luzac & Co.) Pp. x, 132. 6*s*.

Nevins, Allan. *This is England To-day.* (New York : Charles Scribners.) Pp. x, 164. $1.25.

Professor Nevins, with the experience both of a journalist and a historian, has presented a review of conditions in England during 1941 which will be of interest to those who had not the same opportunities to study them on the spot.

Potter, Pitman B. *Article XIX of the Covenant of the League of Nations.* Geneva Studies, Vol. III, No. 2, August, 1941. (Geneva Research Centre.) Pp. 98. $0.40 or 1.75 Swiss francs.

Tulane Law Review. Vol. XVI, No. 1, December, 1941. (The Tulane University of Louisiana, New Orleans.)

Mr. Philip Gladstone contributes a valuable article to the December number, in which a comparison is drawn between the Civil Law and Common Law doctrines of partnership. It shows the contrasts and similarities between the principles in the Civil and Commercial Codes and the precepts of the Uniform Partnership Act in the United States, which was based upon Lindley's English Act of 1890. The article thus provides a complete synopsis of all the Codes of the South American States upon the salient points in the Law of Partnership. It is in addition a singularly businesslike study in comparative law.

United States : *State Law Index*, 1941, No. 5 and No. 6, i and ii. (Washington : Library of Congress, Legislative Reference Service.)

The following periodicals are also received : American Bar Association Journal ; American Journal of International Law ; American Political Science Review ; The Arbitration Journal ; Bombay Law Journal ; Bombay Law Reporter ; Calcutta Weekly Notes ; Canadian Bar Review ; Chinese Social and Political Science Review ; Columbia Law Review ; Hindustan Review ; International Labour Office Bulletin ; International Labour Review ; Journal of the Parliaments of the Empire ; Juridical Review ; Law Quarterly Review ; League of Nations Journal ; Madras Law Journal ; Medico-Legal Review ; New York University Law Quarterly Review ; Revue Internationale de la Croix Rouge ; South African Law Journal ; Toronto University Law Review ; Tulane Law Review ; Wisconsin Law Review.

THE CONSTITUTION OF THE BRITISH COMMONWEALTH.*

[*Contributed by* Sir Alison Russell, K.C.]

It is not possible to discuss even the outline of the Constitution of the British Commonwealth without in the first place giving a brief consideration to the British character. A constitution which, in so many important matters, depends on custom, practice, and the carrying into effect in good faith of many more or less indefinite understandings may well strike a legislative draughtsman with amazement, and his amazement can only grow as he contemplates the astonishing fact that, somehow or other, the Constitution works. Under the lead of the Englishman (and, as a Scotsman, I may say this)—under the lead of the Englishman, the British peoples have developed a respect for the law, written and unwritten, and for constitutional conventions which, though they have never expressly been laid down, are nevertheless as binding as any written law, which amounts, it is submitted, to a kind of genius. The Englishman is tenacious and stubborn in defence of his rights—very conscious of what he considers fair or unfair dealing, but always ready to talk over matters, to give and take, and to come to some reasonable arrangement. These characteristics have become the characteristics of the British people, and they have been taken with them to whatever part of the world they have gone.

The British Commonwealth consists of the United Kingdom, the Dominions, and India, and the Crown Colonies. It comprises 13 million square miles—about a quarter of the world's surface. It has 500,000,000 citizens, rather over a quarter of the world's population—peoples of many different cultures, races, and habits, living at varying stages of social development from the most primitive to the most advanced. Time does not admit of my dealing with the complicated subject of India.

It does not come within the scope of this lecture to state how this extraordinary gathering of different peoples has come about. The greater part of the Commonwealth has been acquired by settlement overseas of British subjects in uninhabited or almost uninhabited territory. One of the Councillors of Henry VII of England said to the King, " If we would expand ourselves, let it be by that way we can, and to which eternal Providence hath destined us, which is the way of the sea." The first attempt to establish a settlement was in Newfoundland in 1583. The first colonists landed in Virginia in 1585. The reason for the migration was partly religious and partly economic. In 1609 the Virginia Company stated that its motives were: (i) " the propagation of the Gospel," (ii) " transplanting the rankness and multitude of our population," and (iii) " the appearance and assurance of private commodity to the particular undertakers."

They were tough people, the pioneers: they were the people who acquired the Dominions. No complaint was made at the time—but now the Germans, and the Italians, and the Japanese are full of complaints about it. They assert that the time has come for the Dominions to be surrendered to younger and more virile nations.

In many cases peoples have put themselves under the British protection, either becoming British subjects or accepting a British Protectorate, and in a few cases a title rests on conquest.

But none of these acquisitions was the result of deliberate attack with the intention of conquest. They were brought about as a consequence of other events. At least, that is the British view of the matter. Certainly as regards the part of Africa that I know best—Uganda and Kenya—the British Government were most reluctant to have anything to do with them, and they were only compelled to take action by the pressure of public opinion at home, which was concerned with the suppression of the slave trade.

First, let us consider the constitution of the United Kingdom, which has been

*A Lecture delivered in Lincoln's Inn Hall, on July 1, 1942, to Lawyers of the Allied Nations.

more or less closely followed by the Dominions. The United Kingdom consists of England, Scotland, Wales, and Northern Ireland. It is a fortunate thing that Welshmen can remember that Henry VII was a Welshman, a Tudor King of England, and Scotsmen can remember that James I of England was James VI of Scotland—ancestors of all our Kings.

The King is the head of the State, and he has many duties of the greatest importance. In addition to respect for his historical position, the King acquires a deep knowledge of men and affairs at home and abroad, and although he acts in accordance with the views of the Government of the day, it would be a mistake to consider he merely follows the advice of Ministers. Far from it; the King may be a very powerful influence indeed.

When Parliament is dissolved or when the Prime Minister resigns, the King sends for the statesman likely to command a majority in the House of Commons. The outgoing Prime Minister is often consulted as to the choice of a successor.

Parliament consists of the House of Lords and the House of Commons.

The House of Lords has about 800 members, of whom the major proportion are hereditary peers. Such a hereditary body may seem to be curious in a democracy, but, in fact, about half of the peers have been created during the last fifty years. Its members include industrial magnates and Press magnates, judges, admirals, generals, and other learned and experienced men of affairs. It has been said that one would get a better opinion from the House of Lords on any matter, from a difficult point of law to the shoeing of a horse, than from any other body of men. The House of Lords may revise or amend Bills introduced in the House of Commons, and Bills may also be introduced in the House of Lords. In common with all Senates, the House of Lords tends to have a conservative outlook—though by no means so much so as might be thought likely. Up to the year 1911, the only means by which the House of Commons could compel the House of Lords to bow to their wishes was the power of the King to create a sufficient number of peers who could be trusted to vote as the Commons wished. In 1911 the Parliament Act was passed which provides that a Money Bill sent up by the Commons but not passed by the Lords within a month becomes law; and that any other Bill which is passed by the Commons in three successive sessions during a period of not less than two years and is rejected by the Lords in each of these sessions becomes law without the consent of the Lords. The question whether a Bill is or is not a Money Bill is a question which is decided by the Speaker of the House of Commons. So that the power of the Lords is nowadays reduced to delaying legislation for a period of two years. On the whole, the British democracy seems to me rather to admire the House of Lords: the average English voter does not want to do things in a hurry—he is content with what Mr. Sidney Webb calls "the inevitability of gradualness."

The House of Commons consists of about 600 members—300 country constituencies, 300 urban constituencies. There is no requirement as to residence for a candidate. It is frequently a great advantage to the candidate if he has local connections: but that is not always the case. The interest that the British citizens take in Parliament is shown by the fact that at general elections about 80 per cent. of the voters register their votes.

The power of Parliament is unlimited—there are no constitutional limitations to that power, and no court of law can disallow laws enacted by Parliament. It has been said that Parliament can do anything except make a man a woman and a woman a man: and I am not quite sure that by a series of ingenious definition clauses it could not even do that.

In the British Parliaments there is a strong tendency to divide the members of Parliament into two parties—the Government and the Opposition. The Opposition criticizes the action of the Government—it has been said that the duty of the Opposition is to oppose, and the Opposition is always known as His

Majesty's Opposition. A notable and rather remarkable fact is that the Leader of the Opposition is paid £2,500 a year for his services to the State.

The work of Parliament is directed by what is known as Cabinet government. The Cabinet consists of a number of Ministers of State, usually about 20, presided over by the Prime Minister. The Prime Minister is chosen in this manner—the King, or in the Dominions the King's representative, sends for the statesman that he thinks most likely to be able to form a Cabinet. Occasionally, a doubt arises as to which statesman should be chosen. In that case, the King would probably consult the outgoing Prime Minister. If the person chosen finds that he cannot get together a suitable Cabinet, the King sends for some other person. An interesting example of the way in which the British Constitution is gradually amended is the understanding in recent years that the Prime Minister must be a member of the House of Commons. No express provision of law exists to this effect, but there is no doubt that this understanding has now all the practical effect of a law. The Prime Minister selects his Ministers and he may demand the resignation of any Minister. It will be seen what a great power the Prime Minister has. In fact, an election may be said to be held for the purpose of deciding who is to be Prime Minister.

The ordinary period of the life of Parliament is five years, then there must be a General Election; but if the Government is defeated on a vital matter a dissolution may take place before the expiration of five years. The threat by the Prime Minister that he will advise the King to dissolve Parliament before the end of five years is a strong weapon in the hands of the Prime Minister for keeping order among his supporters, since few members of Parliament can be certain of being re-elected.

There is no hard and fast rule as to the matters which a Minister decides for himself and matters which he brings up for decision of the Cabinet. It has to be decided in each case.

The parliaments of the Empire have adopted and adapted these methods of procedure, though their constitutions differ in many respects.

At the end of the American War of Independence, loyalists who wished to remain under British institutions went north into Canada, and it was clear that they would have to be given a parliament to deal with their local affairs. This was done. But the Assembly was subject to the Governor, who was appointed by the Crown and whom they could not control. The Assembly's only right was that of deliberation, but they had no responsibility. The result was continual friction and even risings. Lord Durham was sent out from England to make an inquiry, and his report, known as the Durham Report, is one of the classical documents of British Constitutional history. He advised that the Canadian Assembly should be given power over the King's representative. His recommendation was accepted and the decisions of the Assembly became binding on the Governor. Lord Durham had recommended that the Canadian Assembly should enjoy control over their internal affairs; but their rights have been gradually extended to cover matters of foreign trade and ultimately foreign policy. The recommendations of the Durham Report were extended to other British Colonies which were growing up into Dominions in Australia, New Zealand, and South Africa.

There are six Dominions—the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, Eire, Newfoundland.

As regards Newfoundland, the Constitution has been suspended at the request of the Parliament of Newfoundland; and the Dominion for the time being is administered by Commissioners appointed by the British Government. This course was adopted in 1934 to restore the finances of the country.

New Zealand and Eire have the simplest constitutions, consisting of a single legislature of a lower and upper house, with full powers of legislation.

In South Africa there is a Parliament of a Senate and House of Assembly with sovereign powers. But there are four provincial legislatures, with strictly defined powers.

A comparison between Canada and Australia shows the wide difference which exists between their constitutions.

The constitution of Canada is provided by the British North America Act, 1867. The statesmen of Canada who drafted that constitution desired to prevent alterations in the constitution, and accordingly it was provided that alterations could only be made by the British Parliament. But, of course, the British Parliament would only act in this matter at the request of the Canadian Parliament.

The constitution of Australia is provided for by the Commonwealth of Australia Act, 1900. The constitution can be altered by the Commonwealth Parliament in accordance with the procedure laid down, which includes a referendum to the voters.

In Canada there are nine Provinces. In the federation of those Provinces the Federal Parliament consists of a House of Commons, in which the Provinces are given representation according to the population of each, and a Senate whose members are nominated by the Prime Minister for life—fixed numbers being given to each Province. The Provinces have power to enact laws in their provincial legislatures; but the Federal Government can disallow provincial laws if it thinks this is desirable in the interests of Canada as a whole. The Provinces are given authority in matters of local concern, such as municipal government and the like subjects. Legislative power on all topics of importance is given to the Federal Parliament, to which is given all power not expressly given to the Provinces. The Lieutenant-Governors of the Provinces are appointed by the Federal Government.

In Australia, there are six State governments of the usual responsible character. Quite contrary to the position in Canada, the legislative power given to the Federal Government is expressly defined: all power not expressly given to the Federal Government is left to the States. And the Federal Government in Australia has no general power, as in Canada, to disallow laws enacted by the States. The Governors of the States are not appointed by the Federal Government, as in Canada: they are appointed by the British Government.

The Great War of 1914 caused a rapid development in constitutional affairs with regard to the Dominions. When victory was won the Dominions expressed their desire to be represented at the Peace Conference, and, as a result, the Dominions were left free to submit the Peace Treaty to their own Parliaments for ratification or not, as they pleased; and this led to the admission of the Dominions as separately represented in the League of Nations. The next step was the appointing of diplomatic representatives by the Dominions; though, as a rule, the diplomatic representation of the Commonwealth is carried on by the diplomats and consuls appointed by the British Government.

A number of Imperial Conferences have been held between representatives of Great Britain and the Dominions, at which many matters of constitutional importance have been discussed. One of the most memorable was the conference of 1926. The conference appointed a Committee to consider the whole question of the status of the Dominions, with Mr. Balfour as Chairman. The Committee's report was recognized as a classic of what the Commonwealth had become. The report states—

> The Committee are of opinion that nothing would be gained by attempting to lay down a Constitution for the British Empire. Its widely scattered parts have very different characteristics, very different histories, and are at very different stages of evolution; while, considered as a whole, it defies classification and bears no real resemblance to any other political organization which now exists or has ever been tried.

> There is, however, one most important element in it which, from a strictly constitutional point of view, has now, as regards all vital matters, reached its full development—we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.
>
> Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever.
>
> But no account, however accurate, of the negative relations in which Great Britain and the Dominions stand to each other can do more than express a portion of the truth. The British Empire is not founded upon negations. It depends essentially, if not formally, on positive ideals. Free institutions are its life-blood. Free co-operation is its instrument. Peace, security, and progress are among its objects. Aspects of all these great themes have been discussed at the present Conference; excellent results have been thereby obtained. And, though every Dominion is now, and must always remain, the sole judge of the nature and extent of its co-operation, no common cause will, in our opinion, be thereby imperilled.

How true that opinion has proved to be!

In 1929 there was another Imperial Conference. As the result of these conferences, the famous Statute of Westminster was passed in the terms of which all the Dominion Parliaments concurred. The speech of King George V on November 10, 1931, in opening the Parliament at Westminster, stated—

> In conformity with the undertaking given to the representatives of my Dominions in 1930, a measure will be laid before you to give statutory effect to certain of the declarations and resolutions of the Imperial Conferences of 1926 and 1930. This measure is designed to make clear the powers of Dominion Parliaments and to promote the spirit of free co-operation amongst Members of the British Commonwealth of Nations.

The Statute established as law some things which had before rested as convention. Indeed, the opinion has been expressed that it would have been better to leave these matters as they were, so that they might more easily be developed with the passage of time.

Now, the Conferences had accepted the existence of a legal power in the Parliament of the United Kingdom to legislate for the Dominions, and the Statute of Westminster nowhere purports to abolish that legal power. What the Statute does is to reconcile the existence of that power and the established constitutional position.

Paragraph 3 of the preamble of the Statute reads as follows—

> And whereas it is in accord with the established constitutional position that no law hereafter made by Parliament of the United Kingdom shall extend to any of the said Dominions as part of the law of that Dominion otherwise than at the request and with the consent of that Dominion.

Section 4 of the Statute enacts—

> No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion as part of the law of that Dominion, unless it is expressly

declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

Nevertheless, in spite of this enactment, in view of what has been said before about the power of Parliament, there is no theoretical obstacle to the United Kingdom Parliament repealing the provisions of the Statute of Westminster or legislating for a Dominion direct, without the consent of the Dominion. But the only thing to be said about that is that this theoretical power will remain in the limbo of theory.

The Statute provides that no law made by the Parliament of a Dominion shall be void on the ground that it is repugnant to the law of England.

The Statute also deals with the position of the Crown, but this is done only by preamble and there is no operative provision in the Statute. There is no doubt, however, that the preamble would, in practice, have the effect of law.

The preamble provides—

> And whereas it is meet and proper to set out by way of preamble to this Act that, inasmuch as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.

So then, to sum up, the political rights of the Dominions are in all respects equal to those of Great Britain. They can, if they choose, appoint ambassadors or ministers to foreign States. They may make treaties with foreign States: the only obligation, binding in honour on each Dominion and on the United Kingdom, is that no unit of the Commonwealth shall negotiate with a foreign State without informing all the other units, so that they may call attention to any interests of their own that may be involved—though there is no obligation on any unit to accept any suggestion that another unit may make. Each Dominion determines for itself the size and character of its forces. They may declare war or declare their neutrality when Britain is at war.

A great part in the administration of the British Commonwealth is discharged by the permanent Civil Service. Time does not admit of my dealing with that service. It has a very high reputation, though, of course, it is sometimes subjected to more or less serious criticism.

I now come to the Crown Colonies, with which I have been concerned for more than 30 years.

The Colonies differ from the Dominions in the fact that they are in a status of dependency and not of equality with the United Kingdom. The following are certain principles which are applicable to Crown Colonies generally. The British Government has control of the foreign policy and provides security from external aggression; it appoints the Governor, who is the head of each Colony; it can legislate for the Colonies; and it controls all colonial legislation and the colonial finances.

The colonial judiciary are liable to removal, on grounds of misconduct, only on advice of the Privy Council. An appeal lies to the Privy Council for all colonies.

The constitution of a colony is provided by an instrument under the power vested in the Crown by virtue of the common law of England. The Order in Council and the Royal Instructions to the Governor which accompany it set forth the constitution of the colony and the powers and duties of the Governor. The leading officers of a colony are: The Governor, the Chief Justice, the Colonial Secretary, the Attorney-General, the Treasurer.

The Colonial Secretary, the Attorney-General, and the Treasurer are members

of the Executive Council of the colony and they are also members of the Legislative body.

If there is variation in the constitutions of the Dominions, there is still more variation in the constitutions of the Crown Colonies. These vary from Colonies where the Governor alone makes all laws—such a colony as Uganda when I first commenced my colonial service in 1906. It was very pleasant. The Governor gave me his instructions and I prepared Bills. If these Bills were approved there was no further difficulty; they were enacted, and that was all that there was about it, save that the laws when enacted were subject to the consideration of the Secretary of State for the Colonies, who might direct amendments to be made.

From that agreeable form of government, the constitutions of the different Colonies vary from constitutions where the Governor is assisted by an Executive and Legislative Council of persons appointed by him; constitutions where there is an Executive Council and a Legislative Council in which elected members are in a minority to official members; constitutions where elected members are in majority. Then there are constitutions which are both representative and responsible, such a constitution as that of Ceylon or Malta. The constitution of Malta was a genuine Cabinet Government with two parties. The constitution of Ceylon is a constitution of an original kind, in which members of the Legislative Council are divided into a number of Committees, which deal with a variety of matters under the chairmanship of an elected chairman.

The main difference between these advanced types of Crown Colony government and the government of a Dominion is that in Crown Colony government there are always a number of subjects with which the Legislative Council may not deal. Special powers are also reserved to the Governor of disallowing particular kinds of legislation.

As a colonial Civil Servant of many years' service, I may perhaps be pardoned if I express the opinion that Crown Colony government is one of the best forms of government that can be devised for any smaller community. In the first place, the Governor is always a man of experience and frequently of great ability; and I have never known a Governor who was not ready to reconsider the policy of his predecessor. The chief officers of the Colony are from time to time changed and replaced by officers from outside the Colony, bringing with them the experience derived from different colonies throughout the Empire. These officers have one desire only, namely, the prosperity of the colony—the prosperity of the colony may imply their own prosperity and their promotion in the service. In addition to this, there is the general supervision of the Secretary of State and the permanent officers in the Colonial Office with their long experience of affairs in other colonies. The opinions of the citizens are expressed by the non-official members of the Executive Council and of the Legislature—but there is a most happy absence of political considerations when the affairs of the colony are being dealt with. Certainly, if by good government is meant government directed to the general prosperity of the citizens, it would seem to me that for small places no better system of government could be devised.

As regards Protectorates, there are two main classes—protectorates which are governed as Crown Colonies and protected States in which the Government remains in the local ruler, though he may be advised by officers of the Crown. These Protectorates have varied governments suited to the circumstances of each country.

As regards Mandated Territories, these are regulated by the covenant of the League of Nations. Some of these Mandates are given to the charge of Great Britain and some to the Dominions. Their constitutions are also varied, but the League of Nations exercises a supervision over the carrying out of the Mandates, through the fact that an annual report must be rendered which is dealt with by

the League Council. The governing principles are that the well-being and development of their peoples form a trust for civilization. This presents no difficulty to British administration, since it merely applies the governing principles which are now in force in the colonies.

Throughout the colonies, the governing principle of British policy is to interfere as little as possible with the citizen's private life, and to accept, as far as possible, those elements of customary rule which are reasonable and capable of being developed. These methods are very different from the methods used by the Germans. The German method was to destroy native organization and run the districts with the aid of native headmen, who were strangers to the district. I need only allude to the facts that on the West Coast the Germans exterminated the Herreros, 65,000 people, man, woman, and child; and that in Tanganyika, after fifteen years of the civilization, there was a rising known as the Maji Maji rising, in the course of which the Germans slaughtered more than 120,000 natives—the most of them being murdered, after surrender, by the deliberate destruction of cattle, crops, and wells as a punishment. Africans have long memories, and they do not forget these things.

In Tanganyika, since the earliest days of the British administration, officials have been able to tour the country without guards of any kind—I know it, for a year or two after the British Administration took over Tanganyika, I drove my car throughout the territory, accompanied only by my servant, without the thought that I was in any danger whatever from the friendly inhabitants.

No part of the British Empire pays tribute in any form to Britain. Every penny of the money raised by their taxes is spent for the benefit of the inhabitants themselves. And, indeed, recently an annual sum of £5,000,000 has been voted by Parliament for development and welfare purposes in the colonies. No part of the British Empire is obliged to buy what it needs from Britain, or to sell its own products to Britain. More than half of the trade of the colonies is with foreign countries.

This is a picture of freedom as the British Commonwealth understands it, and, at least, it seems to have carried its reward.

Mr. John Morley, in his famous review of Seeley's book, "The Expansion of England," declared it unthinkable that Australia could ever be interested in the neutrality of Belgium. Yet, behold, from the smallest island in the Pacific under British rule to the proudest Dominion, the peoples, of their own free will and not under any compulsion, have joined in the defence of the Commonwealth: with the exception of Eire, which has declared its neutrality, though many of its best and bravest citizens have declined to follow the Eire politicians and are fighting on our side.

That these results should have occurred shows, it is submitted, that there must be virtue in the Constitution of the British Commonwealth.

IMPERIAL RELATIONS WITHIN THE KINGDOM OF THE NETHERLANDS.

[*Contributed by* W. G. Peekema, Esq.]*

The Kingdom of the Netherlands is a State, a unit consisting of territories in Europe, the Far East and the Western Hemisphere. The relations between the parts of this State, in particular those between Holland (the Realm in Europe) and the Netherlands Indies, cannot be judged from a legal point of view alone. They are the resultant of the spiritual forces of the Dutch people and the Indonesian peoples, interplaying with a complex of geographical and economical factors. The blending process, amalgamating them into one political entity, has matured during more than three centuries ; at the zenith of its steady development it has now been abruptly brought to a halt by the invasion and occupation of

*This article represents the writer's personal views and is not to be regarded as an official statement of the Dutch Imperial Policy.

Holland in 1940 and of the Netherlands Indies in 1942.

What in the future imperial relations within the Kingdom of the Netherlands will be cannot be ascertained at the moment ; but it is useful to give an outline of the situation as it was, together with its gradual development. For in this way we can distinguish the broad lines of an historical development stretching over many generations of men, which throws into relief mighty forces, far more powerful than conscious thought or will or influence of single individuals. The picture thus obtained has more than passing value and may be of some use to others than the Dutch and the Indonesians.

For our Dutch imperial history is but a fragment of that greater process, which is the spreading of the West European peoples over the surface of the earth and the merging of their civilization and interests with local civilizations and peoples. The analysis of the essential forces active in this process enables us to throw a glance at the future of the world-wide problem of imperial relations.

We intend to deal only with the relations between Holland and the Netherlands Indies, leaving out the territories of the State of the Netherlands in the Western Hemisphere (Surinam and Curaçao) ; even so it will be necessary to confine ourselves to some of the most important principles, so as not to obscure essentials by enumerating too many facts and details. Most of those lie on the surface only, and by their erratic movements do not indicate clearly the main current of history.

When reading the following it should also be realized that it has sometimes been difficult to find the exact English equivalent for certain principles and legal terms, inherent to Dutch law and its philosophy, which fundamentally differ from Anglo-Saxon conceptions.

History. — As far back as the Middle Ages, Holland can be said to have turned her face towards the sea and the trade that goes with it and her back to the continental hinterland and agriculture.

This pre-eminence of the sea over the land has had its effects ever since for the development of Holland and the Dutch people, for its thought and its ambitions. The sea provinces, in particular the province of Holland with its great financial and shipping centre Amsterdam, became the decisive factor in the political and economic policy of the Dutch Republic ; so much so that the world still knows the Netherlands better by the ancient name of that single province.

In what is now the Netherlands Indies, at the same time and in the same manner, the highly civilized, fertile, trading and seafaring island of Java came to dominate the wide Indonesian Archipelago, of which the other islands were less thickly populated and far less developed.

In the midst of the Netherlands Eighty Years War of Independence (1568-1648) against the Spanish Empire and the Habsburg dynasty, Dutch trade and shipping flourished increasingly. Since 1598 the Dutch had made some minor inroads on the monopoly of shipping to the Indian Archipelago, which up till then had been in the hands of the Portuguese, on account of the occupation of Portugal by the Spanish. Small Dutch expeditions had managed to sail to the archipelago with a view to getting an independent foothold in the spice trade. In 1602 these scattered efforts of the Dutch got a political basis and a new impetus by the establishment of the " Geoctroyeerde Vereenigde OostIndische Compagnie " (Chartered United East India Company) under the patronage of the States General (Parliament), the sovereign power in the Dutch Republic.

The immediate object of the Company in the Indies was trade and profit ; its method was the maintenance of a monopoly against the competition of Portuguese and English, if necessary by force of arms. The Company, therefore, had to face the necessity of building up contacts with Eastern potentates and peoples: on the one hand to ensure a regular flow of trade, on the other hand to obtain fortified territorial strongholds as bases for its fleets and for the warehousing of its commodities.

The Company was favoured by fortune ; it was able to pick men for the management of its affairs in the archipelago who, notwithstanding the fact that they were often of humble origin, as Governors-General proved to excel in statecraft and military abilities. Simultaneously political power and national life in the Indonesian sultanates with which the Company had to deal were decaying ; corruption, discord and civil wars were all to the advantage of the Dutch, and the Company never omitted to foster this process and to make use of it in consolidating its own position.

In this way the Company, in course of time, graduated from a pure trading concern to a strong territorial and maritime power, successfully waging wars on European competitors and, if necessary, against Indonesian potentates ; always adding to its territory, more through negotiations and treaties than through conquest. But trade, monopoly and profits ever remained the primary object of the Board of Directors in Holland, in spite of the fact that many Governors-General in Java were more given to lofty dreams of empire than to the gathering of dividends for the shareholders in the home country.

The character of the Company, however, as a commercial enterprise had permanent effects on Dutch colonial thought and policy. Entirely in harmony with the tolerant and practical spirit of the Dutch people, the Company's policy was one of non-interference in matters of religion, law and social organization of the Indonesian territories and peoples under its authority.

It is worth while to contrast this hereditary Dutch conception of non-interference in the cultural sphere—from which to this day they have not appreciably deviated—with a system of thought and policy as, for instance, formed the basis of the Spanish empire ; the latter got its impetus not in the first place from economic impulses, but from lofty spiritual principles derived from the Roman Catholic faith (the spreading of the Gospel) and the " droit divin " of the monarch. In later times it was primarily the French imperial ideal, fed by two such different sources as Catholicism and the French Revolution, which could not aim at anything else but to transform to the French pattern the native peoples under French authority, at least in spiritual matters. But even after the days of the Company were over, the Dutch imperial conception remained virtually always a system of maintaining the Indonesian character of the country and the people, merely combined with the idea of attaining a blending with Dutch culture, organization and interests.

At the close of the 18th century both the Company in the Indies and the social class in Holland controlling it had gradually declined owing to excess of riches and corruption. The cyclone of the new era, beginning with the French Revolution, swept them both aside. The Company and its possessions were taken over by the State.

When Holland was annexed by Napoleon and incorporated in the French Empire (1811), the Prince of Orange, then in exile in England, made an arrangement with the British Government with a view to keep the Dutch overseas possessions in the East and West Indies, Ceylon and the Cape of Good Hope out of the hands of the usurper. As a result of the recommendations of the Prince and his traditional prestige in the Netherlands and overseas, the Dutch territories in the Indies hardly opposed a British occupation. In 1816, after the restoration of the Netherlands as an independent Kingdom, these Dutch overseas territories were restored to Dutch authority in accordance with the arrangements made (with the exception of Ceylon, the Cape and several territories in the West Indies ; these remained in the possession of England in lieu of a " retaining fee ").

In consequence of the exhaustion which in Europe followed upon the Napoleonic wars, thoughts and circumstances in Holland were not yet ready for the task of shaping a new and clear-cut colonial policy. This period of uncertainty lasted from 1816 till 1830. But then by the authority of King William I a vast imperial scheme was put into practice, which is generally known as the

" Cultures-system." It combined the exploitation of the natural riches of Java with the development of Dutch shipping and commerce.

The characteristics of this Cultures-system were the following: Java contributed the advantages of its fertile soil, tropical climate and abundant labour, inasmuch as the native population was made to plant 1/5 of the arable land with staple products (mainly coffee, indigo and sugar) and to deliver these up to the Government, partly as taxation, partly against fixed prices. The part played by Holland in this scheme was that these products were subsequently shipped by Dutch ships to Amsterdam and sold there for the European markets by a Company founded for that purpose (Nederlandsche Handel Maatschappij). This economic system became the foundation of a remarkable development of the natural resources of Java and simultaneously of Dutch shipping and trading. In the meantime it marked a new era in colonial administration ; for the organization and control of this fiscal and agrarian system necessitated a much closer contact with the Javanese population and their native rulers than had ever existed in the days of the East India Company.

The Cultures-system indeed brought into being the " controller," one of the characteristic elements of that typical dual organization of the civil service in the Netherlands Indies, which ever afterwards remained a factor of primary importance in the development of the country and its inhabitants. The native nobility, who in former days had merely become vassals of the East India Company, were now in the service of the Government as a salaried class of hereditary civil servants ; they were made responsible for the planting and delivery of the quota allocated to their respective territories under the Cultures-system. The Dutch overseers of the plantations gradually became at the same time controllers over these Javanese civil servants and their ways of getting things done in their districts ; thus, growing in knowledge and sympathy for the interests of the native population, these Dutch civil servants in the end became the protectors of the population both against vexation and oppression from some of their hereditary rulers and against excessive pressure from the side of the Home Government. In this manner a Dutch civil service came to work in close co-operation with the native civil service ; the relations between the two, officially defined by regulations as those " between elder and younger brother," are characteristic for Dutch rule even in our days. This dual system, in combination with the maintenance of the traditional principle of non-interference in native religion, culture, law and social organization, kept native life intact as far as possible, together with a social class of aristocrats, destined for future leadership both by descent and by training.

Although reasonable in principle, and highly successful as far as the exploitation of the natural resources of Java and the benefits for Dutch shipping and commerce were concerned, this Cultures-system gave birth to a multitude of complaints in connection with its practical execution and the interests of the native population. Opposition against it rose with the tide of liberal ideas which was then sweeping the world ; and, as we shall see in the next section, this opposition could exert its full powers through Dutch political life, since in 1848 full parliamentary control over colonial policy had been established in Holland.

Eventually, therefore, about 1870, the Cultures-system had to give way to this Liberal opposition and to its demands of a new colonial policy, based on the principles of free private enterprise and free investment of European capital in the Netherlands Indies. A new constitutional Act for the administration of the Netherlands Indies, enacted in 1854 on largely Liberal principles, had opened the way for these ideas ; but a few wise precautions had sheltered the native population against the impact of unlimited Western economic power on their fragile social system. Among those precautions one must be specially mentioned: it is the absolute prohibition, in any form, of sales or alienation of land to non-natives, both Western and Oriental (Chinese and Arabs). This measure has had the result that the teeming millions of the native population, increasing by leaps and bounds

as a result of stable government and improved economic conditions, have kept as their exclusive possession the main source of prosperity, the fertile soil. The Indonesian peoples were in this way protected from spoliation.

The absence of a vast native proletariat in the cities has of course had far-reaching results on the political development of the country. Western capital, seeking employment in plantations, had to resort to short-term lease of arable land from the native owners, under Government supervision, or to long-term lease of uncultivated land directly from the Government, both in Java and the other islands of the archipelago.

The Liberal period gave a new impetus to the economic development of the Netherlands Indies and the rational exploitation of their agrarian and mineral resources, to the benefit of Dutch and foreign enterprise and of the world in general. In its philosophy, however, there was as yet but little space for a positive and premeditated encouragement of the welfare of the native population, both in the spiritual and in the economic field. The natives, it was then thought, were reasonably well protected by a benevolent and honest civil service and judicature ; many got substantial economic advantages from the rent of their lands to Western companies, or as wage-earners on plantations, while all reaped the benefits from the results of Western technique and organization which accompanied the opening of ever-increasing parts of the country to Western investment and enterprise (public works, transport, hygiene).

One must be familiar with the characteristics of the Dutch, a deeply religious, clear-thinking and reasonable people, to be able to understand that they could not for long remain satisfied with such a state of affairs in the relations with Oriental peoples which Providence and the course of history had joined so closely with Holland. Already in the last decades of the 19th century, political thinkers in Holland and in the Indies against the Liberal doctrine of *laissez-faire* raised the thesis that Holland and the Dutch people, having for centuries derived such great benefits from the Indies, owed a " debt of honour " to the Indies and their population, which the Mother Country could only redeem by active effort to leading them towards a happier life, both in the spiritual and in the material sense. This way of thinking rapidly increased in importance until in 1901 it was embodied in the Queen's speech at the opening of the sessions of Parliament, and thereby became the official, and since then unvaried, Dutch imperial policy.

From the wording of the Queen's speech: " that Dutch policy can only be founded on the principle that Holland has to fulfil a moral obligation towards the Indies," this colonial philosophy derived its name of " ethical policy." Its proclamation heralded the execution of a great programme of measures, all destined to raise the level of spiritual and material well-being of the native population. Great irrigation works were to increase the surface of arable land in their possession ; hygienic organization was to improve their state of health ; education on a large scale was to produce the numbers of literate people, from whose ranks the best were picked to be trained as doctors, teachers, engineers, officials, lawyers and officers, and to be the future leaders of their people.

At the same time democratic institutions were set up, beginning with municipal councils, with the object of training all classes of the population in taking a gradually increasing part in handling public affairs and bearing responsibility.

The results of this ethical policy and the thorough manner in which it was performed can be judged from such widely varied facts as that since then the population of Java alone has increased by half a million a year, while already in 1918 political development had matured to the institution of a central representative body, the Volksraad (People's Council or House of Assembly) in the capital of the Netherlands Indies, where the heads of the Departments appeared as representatives of the Colonial Government to discuss the latter's policy. Of the sixty members of the Assembly thirty are Indonesians, twenty-five Dutch, and five Chinese and Arabs.

This political development, however, will be dealt with in the next section.

Growth of Political Institutions—In the foregoing sections we have briefly outlined some of the most important elements of the relations between Holland and the Netherlands Indies, as they appear from the records of history. Some of these elements are invariable: such as the character of Holland, destined by Providence for activity on the oceans and abroad, and of her people, advanced in civilization, peace-loving and free from racial prejudice. Invariable also is the character of the Indies, blessed by Nature by abundant wealth of soil and climate, and of her Asiatic population, an industrious, gentle and deeply cultured people. Other elements, however, vary with the course of time: such as the object and methods of Dutch activity in the Indies, graduating from commercial relations and treaties to investment and administration ; or the national life of the Indonesian peoples, first in decaying Oriental States, then a politically amorphous mass, but in the 20th century at last awakened to a new national feeling and trained in Western political principles.

Tracing the developments of political institutions and public law during this historical evolution, we shall see that their growth was not always the result of abstract intellectual premeditation, but closely followed life and reality, like all sound legal institutions do: to use the words of Savigny, " they were not made, but they existed and lived with the people."

We have already mentioned that at the end of the 18th century the East India Company was liquidated and its estate, including its territorial possessions, taken over by the State. After the interval of the British interregnum from 1811-1816 this situation continued. Our first step now should be to examine the political and legal basis of this situation at the beginning of the 19th century.

In this connection two principles are of signal importance. The first is that the territories under Netherlands sovereignty in the East Indian Archipelago then were " possessions " of the Netherlands State, according to definitions in the Constitution of the Kingdom of the Netherlands of that time, and recognized by international treaties. The second principle is that the administration of these territories was reserved " exclusively " to the King of the Netherlands.

On closer examination, in the light of the constitutional law and practice of that period, it can be stated that the Netherlands Indies had the status of a " domain," belonging to the Kingdom of the Netherlands, while the reservation of its administration to the King in that constitutional period meant the exclusion of Parliament from the affairs of the Netherlands Indies.

This situation remained virtually unchanged during the Conservative period which, almost everywhere in Europe, followed on the Napoleonic era. It was, however, swept away by the tide of Liberal reforms which started in the third and fourth decade, and which in Holland found its expression in the Constitutional reforms of 1848. These reforms brought the establishment of the principle of " ministerial responsibility," *viz.*, the minister's responsibility to Parliament ; not only in home affairs, but also with regard to the administration of the Netherlands Indies. From then on, Parliament became a factor of paramount importance in the affairs of the Indies ; indeed, Parliament became the decisive factor through its powers of legislation and through its control over the colonial policy of the executive. Formally the King retained, as before, the executive power in the Indies through the Governor-General, appointed by him ; but the word " exclusive " in connection with that power had disappeared from the Constitution, and henceforward it was the " Crown," the combination of the King and the inseparable responsible minister, who wielded it.

In this way the constitutional status of the Netherlands Indies in 1848 had changed too ; from a " domain " or " possession " of the State of the Netherlands, they had become a regular part of that State, both from the political and from the administrative point of view. But there remained one difference of essential importance between the Indies, as one part of the State, and Holland, as

another part ; namely, that the Indies, still being politically amorphous, were a passive part, while Holland was the active part, whose people through Parliament acted on behalf of the Indies also.

During the second half of the 19th century there was a gradual change in the position of the Governor-General *vis-à-vis* the Minister for the Colonies. The former's authority and prestige increased, and in matters of colonial policy such as the extension of direct Dutch administration over larger parts of the archipelago, the views of the Governor-General more than once triumphed over the cautious attitude taken up by the Home Government. But this development was of an internal character ; it had no visible effect on political and constitutional relations as outlined before. These remained unchanged till the beginning of the 20th century, when the " ethical " colonial policy was initiated.

As explained in the preceding section, this policy aimed amongst other things at the awakening and organization of political life in the Indies, based on the principle that members of all races and classes should participate in the conduct of public affairs. At that moment, in 1901, this part of the programme corresponded with political conceptions in Holland and with those held by most Dutch inhabitants of the Indies ; but it was definitely not yet the outcome of a widespread desire among the native population. For amongst them active political life and sentiment, in a modern sense, were practically non-existent.

When we embarked upon this " ethical " colonial policy in 1901, the country still bore a typical " colonial " character, as if it were merely a huge conglomeration of plantations in a distant backwater of the world, inhabited by an Oriental population without political vision or ideals, and controlled by a benevolent colonial autocracy. Taking this into consideration, it certainly seems to have been a bold act of foresight under such circumstances to set out deliberately upon a policy of education, to be followed by political emancipation, destined to lead the Indies within fifty years to a position of imperial partnership with the Mother Country.

Within a few years, however, this programme derived a tremendous impetus from the sudden spiritual change which swept over the entire continent of Asia. Its beginning coincides with the defeat of Russia at the hands of Japan during the opening years of this century. It was the first time in history that a European Power was defeated by an Asiatic Power ; a fact which also in the Netherlands Indies did not fail to reach the remotest corner of the country and to stir the smouldering sparks of racial self-respect among the Asiatic population. This " awakening of Asia " reached its full height during and at the end of the first world war, when the distressing spectacle of internecine strife among the Western Powers was followed by their almost complete exhaustion, together with the promulgation of such abstract and superficial but alluring principles as the " right of self-determination for all peoples," etc.

During this period Indonesian Nationalism had become a real and important factor in the political life of the Netherlands Indies. Thanks to a colonial policy of foresight, channels had been prepared in which this spiritual flood could be led to constructive use ; the forces of growing self-respect and national ambition among the Indonesian population could find expression, first in a system of representative bodies in the municipal and regional spheres, and, since 1918, also in the Central Assembly in the capital. As both the literate electorate and political experience grew, so grew the scope of these representative bodies, each in their sphere of influence.

At the end of the first world war, the position was as follows. Holland had remained neutral, but the spiritual effects which always follow in the wake of human conflicts of this magnitude did not fail to touch her country and people also ; time seems ripe for the realization of some constitutional reforms. That these reforms should include a revision of the relations between the Mother

Country and the colonies was indicated by a number of factors. In the Indies, spiritual and material development on the principles of the " ethical policy " had brought important changes ; from a typical Oriental " colony " in one of the backwaters of the world, the Indies had become a modern country, brimful of spiritual and material activity, in a part of the world that had now come to the fore. Technically the country had been equipped with all the amenities of Western science and technique ; great parts of the population, both Oriental and Western, had become politically wide awake and had learned to exercise political rights in a system of representative bodies on a Western democratic basis. Another important factor was that the Indies and their Government during the war had learned to do without the full guidance of the Mother Country and to rely on their own forces, communications being reduced to a minimum.

The constitutional reforms of 1922 took these factors into full consideration: they brought, as a new principle of primary importance, the recognition of the autonomy of the Netherlands Indies in all internal affairs. This principle in the Constitution of the Kingdom of the Netherlands was to be worked out in detail in a new Constitutional Bill for the Netherlands Indies ; this was enacted in 1925.

The four paragraphs of the Constitution of the Kingdom of the Netherlands, which since 1922 form the basis of the imperial relations, read as follows:

" *Paragraph* 1. The Kingdom of the Netherlands consists of the territories of the Netherlands, the Netherlands Indies, Surinam and Curaçao.

" *Paragraph* 62 The supreme authority over the Netherlands Indies, Surinam and Curaçao is vested in the Crown. In so far as the Constitution or an Act of Parliament do not reserve special governing rights to the Crown, the general administration is exercised, in the name of the King, by the Governor-General in the Netherlands Indies, and by the Governors in Surinam and Curaçao, according to principles that shall be regulated by Act of Parliament.

" *Paragraph* 63. The principles of administration in the Netherlands Indies, Surinam and Curaçao shall be regulated by Act of Parliament ; other subjects can also be regulated by Act of Parliament, when the need for regulation by such an Act appears to exist. The representative body of the territory concerned is to be consulted on these Acts, according to procedure laid down in the Constitutional Act, with such exceptions only as foreseen by that Act.

" Apart from exceptions as foreseen in the first part of this paragraph, all legislation concerning the internal affairs of the Netherlands Indies, Surinam and Curaçao is left to the political institutions there, when not an Act of Parliament reserves specified subjects or special cases to be regulated by the Crown.

" *Paragraph* 64. Legislation enacted by the political institutions overseas, mentioned in the foregoing paragraph, can be rescinded by Act of Parliament, in case of infringement of the Constitution, an Act of Parliament or the public interest.

" Such legislation can be suspended by the Crown, according to procedure to be regulated by Act of Parliament."

To judge the importance of these new principles it is necessary to compare them with the principles of imperial relations which had existed up till 1922. During that preceding period the Netherlands Indies had also been part of the Kingdom of the Netherlands, but—as has been stated before—a rather " passive " part from the political point of view. The Governor-General had to consult the Assembly on matters of finance and legislation ; the Assembly had the right of criticism on these matters and on the general policy, but then only as an advisory body. The Governor-General had the position of a high official ; he was as such personally responsible to the Crown. For colonial policy the Minister for the Colonies was responsible to Parliament. In this way Parliament in Holland was the paramount power in colonial policy, controlling the Minister for the Colonies who, in his turn, acting for the Crown, instructed the Governor-General.

Now the reforms of 1922-1925 brought the following essential changes. The

Governor-General and the Assembly got a definite constitutional status: together, as the " political institutions " mentioned in paragraph 63 of the Constitution, they enacted autonomously all legislation concerning internal affairs. In this respect the position of the Crown was now restricted to legislation on specified subjects or in special cases, stipulated by the Constitutional Act or by other Acts of Parliament (mostly subjects of an international or a military character). The position of the Parliament in Holland was restricted to the right to frame the Constitutional Act for the Indies and to enact legislation in such cases where the need for such regulation by Act of Parliament appeared to exist (a few subjects of imperial importance, such as international shipping, currency, tariffs, mining).

As regards matters of general policy and administration, apart from legislation, the Governor-General now derived his authority no longer from his nomination by the Crown as a mere high official, but directly from the Constitution (paragraph 62) and from the Netherlands Indies Constitutional Act of 1925, based on that paragraph of the Constitution. This Constitutional Act of 1925 was framed such that (without yet introducing a formal responsibility of the Executive in the Netherlands Indies to the Assembly) it established the essential democratic principle of full public control over the executive by the Assembly, by means of its budgetary and co-legislative powers.

In this way, the centre of gravity in connection with the administration and legislation in the Indies had been shifted from The Hague to Batavia. Nevertheless, the political ties between the two parts of the State were maintained on a different level. For the Constitution of the Kingdom maintained full responsibility of the Minister for the Colonies to Parliament for all matters concerning the administration of the Netherlands Indies. This could not be otherwise ; for, as we have stated just now, the Netherlands Indies Constitutional Act of 1925 had not yet established formal responsibility of the executive in the Indies to the Assembly ; and in our Dutch way of constitutional thinking, formal responsibility for all matters of policy had to be given to some representative body. As long as responsibility could not yet end in the Assembly in the Netherlands Indies, then Parliament in Holland had to maintain its position of exercising the rights to demand responsibility and to have the final decision in matters of policy in the Indies.

On analysis of this system it would seem that there existed a gulf between two centres of authority, based on two principles of the Constitution. On the one hand, there was the principle of autonomy: the Governor-General derived directly from the Constitution his authority of exercising the general administration in the Netherlands Indies and shared together with the Assembly all budgetary powers and all legislative powers concerning internal affairs of the Indies (apart from those few subjects that had been reserved for the Crown or had been regulated by Act of Parliament). On the other hand, there was the principle of Ministerial responsibility: the Minister for the Colonies had remained fully responsible to Parliament for the Governor-General's administration. Of course, this gulf had to be bridged somehow.

The Constitution laid this bridge in the principle of paragraph 62, when it vested " supreme authority " in the Crown (of course to be exercised by the responsible minister). In constitutional practice, this " supreme authority " means the supervision and control over the general policy of the Governor-General and his executive. This principle was formally reinforced by paragraph 1 of the Netherlands Indies Constitutional Act of 1925, which states that the general administration in the Netherlands Indies, as vested in the Governor-General by paragraph 62 of the Constitution, shall be exercised by him in accordance with such " recommendations " as the Crown may see fit to issue to him.

This paragraph I of the Netherlands Indies Constitutional Act was the result of an amendment by Parliament. Parliament was anxious to maintain and

elaborate in this Act the new constitutional principle of autonomy for the Netherlands Indies ; but it was at the same time afraid of a possible revival of colonial autocracy, centring around the Governor-General. The Netherlands Indies executive was not yet made responsible to the Assembly ; where would responsibility end, then? It was feared that under the new constitutional system the Minister for the Colonies should eventually decline also all interference and control by Parliament in matters related to the Governor-General's policy ; true, the Minister's own responsibility to Parliament had remained in principle, but when Parliament should think it necessary to demand a definite action in relation to the Governor-General's policy in the Indies (for instance, when Parliament took side with the Assembly against the executive), it seemed that the Minister then would be entitled to decline such demands, basing his attitude on the autonomy of the executive in the Indies according to the spirit and the phraseology of the Constitution.

Parliament therefore introduced into the Netherlands Indies Constitutional Act the right of the Crown, as the authority vested with the supreme authority, to issue " recommendations " to the Governor-General if necessary, and stipulated that the Governor-General was bound to govern in accordance with these. This being done, neither the Minister for the Colonies nor the Governor-General could evade the obligations resulting from the former's responsibility to Parliament. In this way, the principle of responsible government, in connection with the policy of the executive in the internal affairs of the Indies, was formally safeguarded.

Another of such imperial safeguards was the stipulation in the Netherlands Indies Constitutional Act that the Annual Budget of the Indies, fixed by the Governor-General in agreement with the Assembly, should be presented to Parliament for approval by Act of Parliament.

There are some other safeguards of the same nature. But before going more deeply into this formal side of the imperial relations between Holland and the Indies or between the Home and the Indies Government, it seems expedient to cast our eye once more upon the political realities of which these formal regulations were the expression.

Constitutional and Political Problems.—After 1922 the people of Holland and Parliament realized that the period during which the Indies and a large part of her population had been politically helpless was now drawing to a close, and that the times when Parliament had therefore to exercise full control over the policy of the colonial Government through the responsible Minister would rapidly come to an end. The Indies, on the other hand, with their developing political organization and growing self-confidence, both among the Dutch and the literate Indonesian classes, were very keen on the maintenance of the principle of autonomy, and were therefore opposed to anything neighbouring on " interference " in internal affairs, either by the Minister or by Parliament.

Under such conditions on both sides, it is not surprising that in practice the measure of autonomy of the Indies even surpassed that of constitutional theory. Parliament henceforth exercised its rights of supervision and control in a spirit truly and rightly aloof from detail ; mainly encouraging a policy of rapid progress by a yearly debate on general lines on the occasion of the presentation of the Indies budget for approval. But it is most interesting to note also that the relations of the Minister for the Colonies and the Governor-General—the vital imperial link—followed a development of their own. Here again, growing political life proved stronger than the formal constitutional jacket.

A position of subordination of the Head of the Government of the Indies to the Minister in Holland would not have been a true image of political reality. Therefore, the relations between the Governor-General and the " Crown " (Minister for the Colonies) were merely those between experienced statesmen, realizing each other's special responsibilities and the need of harmonizing their conceptions of policy, through anticipation and persuasion rather than by the

use of stipulated rights. Indeed, in the years following on the reforms of 1922 and 1925 up till 1940, the aforementioned right of the Crown stipulated in paragraph 1 of the Netherlands Indies Constitutional Act to issue " recommendations " to the Governor-General was not used once. In the same spirit, the right of Parliament to rescind legislation enacted in the Indies such as "infringed on the Constitution, an Act of Parliament or the public interest " (paragraph 64 of the Constitution) was never used at all ; nor was the right of the Crown to suspend such legislation ever exercised.

It is from such facts that appears the underlying reality of imperial relations, which is far more important than the wording of formal constitutional paragraphs. The unity of the Kingdom virtually depended on the informal, practical co-operation between the Minister and the Governor-General. Constitutional autonomy of the Indies, as a stage on their road to complete emancipation, was not a product of political speculation or theory, but the result of a development of life and circumstances, which had merely been recognized in time by Dutch imperial policy.

This policy was not a subject of party politics or controversy in Holland. Dutch politics are remarkable because they are mainly organized according to differences in religious conceptions ; these differences have nothing to do with the Indies. The Dutch people, cool and level-headed, mentally distant from " imperialistic " ambition, could never have been brought to tolerate a return to an imperialistic policy, one of reaction and interference, by authority in Holland. Every Minister, and Parliament, could not do otherwise than to act accordingly.

These facts, on the other hand, were instinctively recognized by the exponents of political life in the Indies, and of the Indonesian population in particular. They felt that in the imperial relations with a people such as the Dutch there were not, and could not be, lurking dangers of perpetual " domination," because the course of events itself had made it clear that nothing else but complete political emancipation of the Indies could be the ultimate aim of Dutch colonial policy.

Of course, we had our problems and our differences of opinion within the Kingdom of the Netherlands, also with the various representatives of Indonesian political thinking. Such problems and differences of opinion, however, occur within all peoples and all States. With us, and between Holland and the Indies, they were not connected with matters of principle, over which political opponents face each other with irreconcilable antagonism, but mainly with the methods and the speed with which the complete emancipation of the Indies should be attained, while maintaining, on the other hand, the necessary cohesion between the two parts of the State.

In the scope of this article we must now examine the two problems which since 1922 absorbed almost the entire attention of public opinion, both in the Indies and in Holland, as far as imperial affairs were concerned. One of them was the question when and how full responsible government in internal affairs could be established in the Indies, whereby the last traces of control of the internal administration of the Indies by Parliament in Holland in combination with the Crown could be abolished. The second one was the question of the introduction of the Indies, as a partner together with Holland, in the discussions and decisions on the affairs of the Kingdom as a whole: *e.g.*, foreign relations, defence, imperial cultural, financial and economic relations.

When dealing with the first of these problems, we must remind our readers that the Constitution of 1922 contained the principle of autonomy of the Netherlands Indies in internal affairs. The Governor-General, as the head of the executive, was no longer a mere high official, but derived his authority directly from the Constitution and the Netherlands Indies Constitutional Act based thereon; his relations with the responsible Minister for the Colonies were mainly based on the axiom that for practical political reasons a certain harmony

on the general policy between them should be maintained. In matters of legislation the Constitution also contained the principle that these should be left to the " institutions " in the Indies, with the exception only of those items specially reserved to the Crown (mostly of an international character, such as defence and immigration) or those items that Parliament had reserved for themselves (a few matters of major importance, such as the legislation concerning tariffs, currency, international shipping and mining).

The sphere of autonomy in the Indies included the Departments of Justice, Finance, Home Affairs and Police, Education and Religion, Economic Affairs, Public Works and Communications, Army and Air Force, Naval Affairs (in so far as connected with the squadron of the Royal Navy stationed in the Indies) and Shipping. *Via* the budget the Assembly exercised full public control over the Government of the Indies' policy in these matters; the heads of the various Departments represented the Governor-General in the discussions, while in affairs of general policy not specially connected with a Department (such as imperial and external relations, political and Indonesian affairs, etc.) a Political Secretary for the Government took part in the debate.

In this sphere of autonomy authority was shared by the Governor-General and the Assembly. Legislation (" ordinances ") was enacted by the Governor-General " in agreement " with the Assembly: the Assembly had the right to amend and to introduce Bills. In the same way the budget was enacted by the Governor-General " in agreement " with the Assembly, which had the rights to amend it and to introduce budgetary proposals. In this system, therefore, " agreement " between the executive and the Assembly was the goal, which the executive had to attain by discussion and persuasion. The policy of the executive had to be shaped so that acceptance of its proposals by a majority of the Assembly could be anticipated; and the heads of the Departments were chosen also with a view to their ability to gain the co-operation of such a majority.

In this way, a system of " government by persuasion " had been developed in the Indies, which contained the essential elements of " democracy ": (1) full public control over the acts of the executive; (2) a Government policy in harmony with the convictions of the people, as expressed by a body of free and inviolable representatives; (3) at the head of the executive and of the services stood men who had to retain the confidence of the representative body.

This system is remarkable for its development in a direction which differs from the principles of Dutch constitutional law, and is somewhat similar to the American style of democratic government. In Holland (as elsewhere on the continent of Europe) parliamentary government more or less resembled British constitutional practice, the executive being responsible to Parliament, which could if necessary compel the Cabinet to resign. In the Indies, on the other hand, the executive (Governor-General and the heads of the Departments directly responsible to him) could never be removed by the Assembly in this way; but in order to be able to fulfil regularly their task of government they had to gain the co-operation of a majority in the Assembly, with its co-legislative and co-budgetary powers.

It is evident, however, that in each system of government based on the division of authority between an executive and a representative body, and on the co-operation between these two, there must be a procedure for the solution of difficulties arising from a " deadlock " between the two political powers. In the constitutional law of the Indies this procedure was as follows:—

In matters of legislation, if the Assembly rejected Bills introduced by the Government, or amended them in a way that was not acceptable to the Government, the Governor-General could invite the Assembly to reconsider the Bill; when a solution was not reached the second time the Bill could be enacted by the Crown, if enactment was considered of vital importance. In cases of extreme urgency

the Governor-General could enact the Bill on his own authority, and the Assembly could then appeal to the Crown.

In matters of budget, when agreement on any estimate could not be reached between the executive and the Assembly, such a part of the Indian budget had to be fixed by Act of Parliament in Holland.

In both cases, budgetary and legislative, Parliament in Holland, therefore, held the final decision; in the first category directly, in the second through the Minister for the Colonies, who was responsible to Parliament for the decision of the Crown.

The political problem now before us was that in this way Parliament in Holland eventually held a position of arbitration between the executive in the Indies and the Assembly. In the course of the years it rarely happened that Parliament had to exercise this function—as a matter of fact, both sides in the Indies were equally opposed to this kind of interference from overseas, and were, therefore, anxious to reach any sort of understanding between themselves rather than appeal to higher authority in Holland. Nevertheless, in this system the potential final authority in internal affairs of the Indies was in the hands of Parliament in Holland. It could, therefore, be said that this system embodied a final control over the administration of the Indies in the hands of the people of Holland; for Parliament, according to the Constitution of the Kingdom, represents the people of Holland only. In this way the complete emancipation of the Indies could not yet be said to be attained; for the people of Holland, represented in Parliament, could, at least according to constitutional theory, enforce a definite policy in the Indies; first, by compelling the Minister to issue " recommendations " to the Governor-General to follow a certain line of conduct, and, finally, through solving the legislative and budgetary deadlocks ensuing from such a recommended policy between the executive in the Indies and the Assembly.

Remote as such a possibility may have been in political practice, the fact remains that the position such as it was in a constitutional theory was clearly recognized by all elements of political life in the Indies (Indonesian and Dutch alike) as a remnant of external domination which was resented by all and should eventually be removed. The question, however, was what system of " checks and balances " between the executive in the Indies and the Assembly was to take its place.

In this connection it must be remembered that political life and organization in the Indies were still very young. It was rooted in the active public spirit of only part of the population: out of 70 million inhabitants, it could be said that some six to eight million Indonesians, about half a million Chinese, and the 250,000 Dutch could be considered as full-grown " citizens." Some 60 million Indonesians, however, were still to some degree politically helpless, not yet able to organize themselves into parties, to stand for their rights and interests. Moreover, financial and economic interests in the country, always a factor of primary importance in politics, were concentrated for a great percentage in the numerically inferior groups of the European and the Chinese.

These interests, specially those of that big and helpless Indonesian majority, had to be safeguarded somehow against the possibility of neglect and domination by the politically organized group, who held no direct mandate to represent them. For them, the civil service and the executive if necessary could still act as the " paternal " element in the political organization of the Indies and of the Kingdom; operating through the " safeguarding " principles as set out before (the procedure of solving legislative and budgetary deadlocks, the position of the Governor-General, ministerial responsibility, and finally the " supreme authority " of the Crown and the control of Parliament).

As could be expected, a great body of Indonesian political thought felt, on the contrary, that the interests of the non-political mass of the population did

not necessitate such a system of " safeguards " at all. But there was an equally important school of thought in the Indies, among Dutch and Chinese as well as Indonesians, that some such " safeguards " were salutary and necessary, at least for some time, but that the system according to which they were operated no longer corresponded with political realities.

What then was the matter with this system, and what was at the bottom of the opposition against it? The answer is that the powers of final control were in the hands of political institutions in Holland, belonging to the political sphere of Holland alone. For Parliament, according to the Constitution of the Kingdom, represents the people of Holland alone, and the Minister for the Colonies, member of the Dutch Cabinet, was an exponent of political life in Holland. Their influence on the administration of the Indies, where political power was shared by the Governor-General and the Assembly, therefore, bore the character of " external " control, in which the Indies themselves, although constitutionally a part of the State, had no voice.

For those who could agree in principle that at least for the time being some system of supervision and control over the autonomous administration in the Indies was still necessary, but who, on the other hand, were opposed to " external " and one-sided control, or domination by one part of the State over the other, the solution had to be found in this direction: that this supervision and control should be constituted as a matter of " imperial " policy instead of being merely handled by the exponents of Dutch politics; and that there should be created an " imperial " political and administrative organization in which the Indies took part side by side with Holland, to take over the task which so far had been entrusted to a pure Dutch department (Ministry for the Colonies) and to Parliament in Holland.

Having reached this point, we find ourselves at the same time in contact again with the second problem, mentioned earlier: the question of introducing the Indies, as a partner together with Holland, in the discussions and decisions on the affairs of the Kingdom as a whole; *e.g.*, foreign relations, defence, imperial cultural, financial and economic relations.

We cannot discuss these subjects in detail here, but even without such discussion the problems which confronted us may appear clear enough. Items such as foreign relations and the others concern the entire Kingdom of the Netherlands, the State as a whole, which includes the Netherlands Indies. But here again, the shaping of an imperial policy and the decisions in this sphere according to the Constitution were in the hands of political organs of Holland alone: the Minister, the Cabinet, and Parliament.

Now, in many cases the part of the Kingdom which was most directly concerned in these matters was not Holland, but the Indies. To mention only a few examples: the relations of the Kingdom with Japan, both in the political and the economic field, the relations with China, India, Australia, were of more vital importance to the Indies than to Holland; nevertheless, they were taken care of by Dutch Departments (Foreign Affairs, Colonies) and controlled by the Dutch Parliament. Of course, in these matters the Government of the Indies and her experts were consulted, and their advice nearly always followed. Here again it was an effect of the axiom of Dutch imperial policy that the Governor-General and the Minister for the Colonies always agree: the latter then represented the result of their consultations in Cabinet. But politically the Indies, as part of the State, had no direct and constitutionally regulated part in the decisions and no responsibility in the sphere of the representative body.

This situation was no longer in accordance with the position and importance of the Indies, the desire of their population to take a part in imperial policy, or the ability of the administration to cope with the problems arising in this sphere. Here again, political thought and desire followed closely upon development in real life. To mention only a few facts: the Royal Netherlands Indies

Army, including its Air Force, was a separate entity, organized, supplied, manned and officered, and entirely paid for from the Indies budget. The costs of the squadrons of the Royal Navy, stationed in the Indies, were also borne by the Indies Treasury. Imperial defence, therefore, was a matter for which the Indies shared responsibility. A system of international economic relations had been established, which was directed from Batavia. The Indies had their own trade commissioners in the countries where their economic interests were important. Moreover, such events as the economic negotiations with Japan, which were held at Batavia by Royal delegations consisting of experts from the Netherlands Indies departments, clearly indicated that the country was equipped as well as eager to play a more prominent part in the international affairs of the Kingdom as a whole.

Following the development of political thinking, to which we referred before, the exponents of political life in the Indies in this respect, too, advocated a system of imperial administration and representation to deal with imperial affairs; in this system the Indies, not only the bureaucracy, should play their part and have their share of influence side by side with Holland.

In this way, slowly, the future outline of the imperial relations within the Kingdom of the Netherlands began to shape in accordance with the realities of modern times. It would be a structure, based on the principle that purely internal affairs of the parts of the State, both Holland and the Indies, should be left to their own administration and political organization, while affairs of imperial interest (including the supervision over home affairs of the Indies, so long as such control was necessary) were to be dealt with by imperial authority, including a representative body in which the parts of the State were represented.

In the years preceding the outbreak of war, the study of the constitutional problems connected with the realization of such a scheme had already been initiated. Then the invasion of May, 1940, temporarily eliminated Holland and her people from the discussions; but in the Indies, research and examination of the various schools of thought in this field were continued by a Commission, which published its report at the end of 1940. At the opening of the sessions of the Assembly in June, 1941, the Governor-General in Batavia read a Royal message, containing the decision of the Crown that immediately after the liberation of Holland an imperial conference was to be summoned there, consisting of leading personalities from the four parts of the Kingdom, to draft the foundations of the new constitutional structure. At the end of that year the war with Japan broke out, and now the Indies are under enemy occupation.

Nevertheless, the business of studying these problems and of the task of sifting the evidence which has so far been collected goes on, under the authority of the Crown—the one centre of authority in the Kingdom of the Netherlands, in Holland and in the Indies, which can never for one moment be eliminated or obscured by the havoc of war.

Retrospect and Prospect.—We have tried to survey the origin and the scope of imperial relations within the Kingdom of the Netherlands. It seems indicated now to consider what has been the result of this combination of two distant and widely different countries in one political entity, from the point of view of the peoples concerned.

If this article is to be of any value to the student of imperial relations, it must try to be free of national bias and must not be an attempt at propaganda. This is a particularly difficult task for a Dutchman, because our attitude to the Netherlands East Indies is to a considerable degree influenced by sentiment. The Dutch have a great fondness for the Indies and the Indonesians; many of us, who lived out there, prefer to spend the rest of our lives in the country after our careers have come to an end; we all have personal friends among the Indonesians. Life in the Indies for us is not a temporary stay, the Indies mean

" home " to us; this explains the fact that there was no thought of evacuating either the Dutch population or the Governor-General and the Services at the moment in March, 1942, when the war in the Pacific turned against us. Even the people in Holland who had not had the privilege of living in the Indies had from childhood onwards, at school, through Press and radio and through their political institutions, been continuously in contact with the idea of the Kingdom overseas, where generations of Dutch men and women had lived, worked and raised their families. We are rather proud of our part in the rapid development of the Indies during this century into a modern and prosperous country.

To eliminate as far as possible the influence of sentiment, we have, therefore, to rely for our conclusion on a few facts of outstanding importance. Foremost among those ranks the fact that after the occupation of the Mother Country by Germany in 1940, as well as before and during the war against Japan, the Indonesian population have remained fully loyal to the Queen, to the people of Holland, and to the Government of the Indies, represented by the Governor-General. There has been no attempt on the side of any Indonesian political group or party to use the difficult international situation in which the Netherlands Kingdom had been placed since May, 1940, as a means to bring pressure to bear for the extortion of political advantage, let alone to sever imperial relations. On the contrary, since the occupation of Holland in 1940 there has been noticeable in the Indies a marked tendency on the side of the Indonesian political movement to come to an even deeper understanding with the people of Holland, now that it had come to live in such difficult circumstances. This, it was often stated on their side, was but a consequence of the Javanese conception of chivalry, which had always remained part of their national character and philosophy.

Innumerable were the spontaneous declarations of loyalty to the Queen and the Kingdom of the Netherlands from all Oriental classes; while, again, at the moment of growing tension before the outbreak of hostilities with Japan the extreme left wing of the Indonesian political movement made it formally clear that in such issues, where the whole Kingdom was involved, they stood behind the Government.

To the student of political relations within empires the world has known, it is clear that there was, and still is, a wide variety in the feelings and ideals of the peoples concerned: ranging from hatred and passionate struggle for severing imperial relations on the one side, to an equally passionate conviction of inseparable companionship and eagerness for the perpetuation of unity on the other. A detached and critical analysis of the situation within the Kingdom of the Netherlands would at least show a happy medium between such extremes, with a noticeable balance on the side of good fellowship.

The attitude of the Dutch people in these imperial relations was not only and not even mainly influenced by the fact that they had toiled in the Indies for centuries, and that keeping together with the Indies is a life-and-death matter for the Mother Country. As has been said before, the Dutch are fond of the overseas territories of the State. For generations they had been familiar with the fact that yearly thousands of young Dutch men and women went abroad to spend the best part of their lives in the Indies, while in later days permanent settlement there became more and more popular, as a result of the development of educational institutions, the establishment of university training, etc. There was hardly a family to be found in Holland who had no personal relations in the Indies.[1] To put it shortly, in Holland the overseas territories had long ceased to be a distant or mysterious factor; they had in the conceptions of the people indeed become as real a part of the State as they were according to the Constitution.

[1] The extent of these relations can be judged by the fact that before the war there was a thrice weekly air-service between Amsterdam and Batavia and *vice-versa*, together with a wireless telephone service " from house to house " which was booked for every minute of the day.

In the attitude of the Indonesian population towards the imperial relations with Holland one could observe differences, which were related with the varying level of education and other spiritual factors. The great mass of about 60 million people were still politically indifferent; for those who realized the existence of Holland, of imperial authority and of Dutch control at all, even if it were only vaguely, these notions to them were somehow associated with stable administration, with peace and order, and a substantial measure of economic security. As a result of the dual system of civil service, mentioned in the second section, this mass of the population were ruled mainly by men from their own aristocracy, and their direct contacts with Dutch officials were few.

The burning question of imperial relations, however, is not mainly connected with the masses on this intellectual level (although a good many theoreticians, for reasons of their own, persist in making the world believe so). As an imperial nation the Dutch could be perfectly justified, when their controlling position for these masses of the Indonesian population brought freedom from fear and vexation, from famine and epidemics, even when it was associated with some interference and disturbance in the static existence of the Indonesian peasant. The big political problem lay elsewhere: in the minds of those classes of Indonesians who had been educated to be able to grasp such ideas as racial and national self-respect, patriotism and political self-determination. They could intellectually understand far better than their illiterate compatriots the advantages of modern administration, science and technique which the political unity with Holland had brought; but they were, on the other hand, mentally far more disposed to feel the crushing effect of the impact of Western political power and civilization upon the national life of their own people.

It is a fact, with which the student of imperial relations between different peoples in the course of history meets again and again, that the material and even spiritual advantages of imperial control by a more highly organized people are never able to eliminate a general subconscious feeling of uneasiness and sorrow caused by domination of one people over the other. It appears to be possible only to overcome this feeling to some extent by a complete amalgamation of peoples, particularly in religion and culture: the Romans succeeded in such a policy and their Latin successors on the imperial path followed a similar direction. The Dutch, as we have seen, on the contrary, inherited a colonial policy on different principles: they believed in keeping the original cultural and social basis of the Indonesian peoples intact as much as possible and tried to build on top of it.

When the Dutch were confronted with the problem that the Indies gradually were " coming of age " in the political sense, they consequently realized that this feeling of uneasiness, caused by the political domination of Holland over the Indies, could not be remedied in what we could call " the Latin way." The task before us was clear: we had to eliminate those lingering elements of " domination " in exchange for a system of active imperial " partnership," in which each side remained on the basis of its own philosophy and culture and on its own political principles, but where a common higher national ideal and interest was shared by both. In other words, the foundation of the Dutch empire of the present and the future had to be an expression of a definite *désir d'être ensemble,* which, according to the definition by Ernest Renan, forms the spiritual basis of all national life. Just as the Dutch distinctly felt themselves to " belong " to a greater and higher political entity than Holland, so the people of the Indies should be enabled to adhere with their loyalty, ambitions and ideals to that greater and higher political entity, the Kingdom, quite apart from enjoying political freedom in their own sphere.

Some day it will be possible once more to analyse this part of our imperial history with complete scientific detachment. It will, we believe, be stated then that an imperial consciousness, shared by the two parts of the Netherlands

Kingdom, a real " desire to keep together," was steadily growing, and that it was mainly due to the delay in constructing a corresponding political organization that the process was not finished sooner. In fact, in one sphere the merging of political ideals was already completed. We refer to the adherence of all nationals of the Kingdom to the House of Orange as the head of the State: the allegiance to the dynasty was absorbed also in Indonesian political thinking. What was still lacking, however, was imperial representation, as a means of establishing an active role for the population of the Indies in imperial affairs, and of making the growing ideal of imperial partnership an element of practical political life for them, as it was for the people of Holland.

In 1901, Dutch imperial policy had wisely anticipated the course of events in the Indies by the introduction of the " ethical policy " several years before the awakening of Asia had made the *élite* of the Indonesian peoples conscious of national ideals and desirous of political rights and emancipation. About twenty years later we were just in time when we established in the Constitution autonomy of the Indies in internal affairs. In the following two decades, however, political thinking and organization had apparently begun to lag somewhat behind the pace of spiritual and material progress.

It seems that not enough clear and original thinking was done in these years by the classes of the population, both in Holland and in the Indies, which carry the burden of political responsibility. Too much importance was attached to easy comparisons of political and constitutional development in the Indies with that in neighbouring countries, like Australia and India; it was not sufficiently realized that circumstances and the historical background there were so entirely different, that we could never succeed by imitating their institutions. By instinct and by adaptation to circumstances, Holland and the Indies had embarked on a course of imperial partnership of a different character which, if anything, was more similar to the American pattern: in order to succeed in forming an organization of imperial relations of our own which would really remain alive in modern circumstances, and to which the Indies could give their hearts, we had to follow further on the track indicated by evolution in the past, which in its turn was rooted in the enduring characteristics of the two countries and peoples.

A critical attitude towards one's own national and imperial achievements in past and present seems to be a source of wisdom for the future. Whatever may have been lacking in the past, both the Dutch and the Indonesians were aware that consolidating an empire in modern times is not a matter only of sound financial and economic relations, but first of all an affair of the heart.

The Kingdom of the Netherlands is an Empire which within its boundaries contains all the spiritual and material elements needed to ensure the happiness of its nationals in different territories. Political sagacity, which is always more instinctive than intellectual, made us respect and preserve in the overseas territories the things which are essential, because they are parts of life itself: racial self-respect, national ideals and culture, lawful pursuit of economic interests, and the love of freedom. After the war and the privations it has inflicted upon our peoples in Europe and in Asia, a reconstructed Kingdom of the Netherlands will rise again, based on the same principles. We believe in this, because the Kingdom was a living thing, and because we believe in life.

SOME PROBLEMS INVOLVED IN THE RECOGNITION OF AFRICAN NATIVE LAW.

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THE reconstruction of Africa is not the least of the tasks that will await the world's attention after the war. A part of this task will certainly be the revision of the policy adopted by various African territories in regard to Native Law. The purpose of this article is to suggest the major legal questions that British policy will find itself faced with. Some if not all of these questions have already arisen in the Union of South Africa, whose experience furnishes in many respects a useful guide both to what might be done and what might be avoided. The Union is the oldest and strongest State in all Africa, with a longer history and a more varied experience of Native policy, including Native law, than any other part of the continent south of the Sahara.

A desire to respect Native law and to apply it where possible is common to all the colonial governments in Africa. During the last half-century many enabling statutes have testified to this desire.[1] These statutes were almost invariably drafted in a permissive form which gave the Courts discretionary power to apply Native law to the settlement of a case between Natives.

The first problem presents itself here. "Native law and custom" is a common enough phrase, but it is not a precise indication of a body of law applied to a particular case in the sense that English or Roman-Dutch or even Hindu or Mohammedan law can be applied. The reason is that there is no one body of Native law in Africa or even in any large region. There are innumerable Native tribes scattered all over the continent and varying in number from a few hundred people to a million or more. Each of these tribes may be described as having its own body of customary law. Some tribes and their laws are related to and resemble their neighbours or other tribes further afield, but often enough neighbouring tribes are ethnically different and culturally distinct, and they also speak unrelated languages. Moreover, these tribal differences by no means correspond with the international boundaries drawn on the maps. A tribal map of Africa shows surprising departures from the political map that one normally looks at. There is hardly a single political frontier which does not cut across tribal divisions in a quite ruthless fashion. The map was drawn in the course of the scramble for Africa in the late nineteenth century, when no one cared, if anyone knew, about nice anthropological differences.

Africans were all illiterate before the white man came. There were consequently no records whatever of their customary law, and it is a matter for regret that European governments have on the whole been so slow to record Native law. Some progress has been made in this direction in South Africa, but even there the purposeful Victorian interest in the subject did not persist into the twentieth century. In British West and East Africa virtually nothing has been attempted and the literature on Native law is of the most meagre kind. If British policy really aims to apply Native law and to assure its preservation for the future, it must take steps to reduce to writing at least those customs which are the cause of regular litigation. It is hardly necessary to add that the recording of

[1] For the references, see my article in *Journal of Comparative Legislation and International Law*, Vol. XX, pp. 16–23 (1938).

Native law need not mean petrifying it. Handbooks are not codes ; and if their publication encourages a movement towards codification, the case for codification will have become so strong by that time as to require careful consideration.

The better the substance of Native law in any area is known, the larger will the next difficulty loom. This is the question of the conflict of Native law with English law (or whatever Common law was originally introduced by the European power). European law is the foundation on which constitutional government rests in Africa. It has also supplied the law of crime, of commerce, of property, and of procedure, as these are branches of law in which Native custom cannot provide rules since they reflect phenomena unknown in Native life. Native law is, however, not something utterly different from European law. Native law is essentially family or personal law, and many of its commonest institutions and categories are the same as or at least similar to those found in European law. Thus there is a Native law of marriage and divorce, of marriage contracts or settlements or dowry, of seduction, of illegitimacy and the adoption of children, of guardianship, of torts, and of inheritance. In all these categories the Native law is, indeed, as one would expect, not as well worked out, nor its concepts as refined, as the comparable rules of European law. Whether it is capable of development to meet the unforeseen circumstances of modern African life is a doubtful question. What really matters, however, is not whether such a development is possible, but whether it is desirable on lines different from or parallel to the European law.

A single example will illustrate the issue. The action for seduction is very common in South Africa. In Native law, as in English law, the father or guardian of the woman seduced brings the action, but he can bring it either against the seducer or against his *kraalhead,* i.e., the head of the collective household to which the seducer belongs, or against both jointly. In Roman-Dutch law, however (which is the Common law of the country), the woman herself, if she is not a minor, brings the action, and only against her seducer. Where statute enjoins the Court to apply Native law where it will best serve the interests of justice, must the Court insist on the woman's father bringing the action? Must it do so even where the woman lives in another province from her father and no longer under tribal conditions but as a free individual? In other words, does the intention to apply Native law deprive a litigant of her rights under the Common law? If, on the other hand, she exercises those rights, does her action deprive her father of his rights under Native law?

These questions arise from the uncertain relation of Native law to European law in Africa. It is a problem that has hardly arisen elsewhere in this form. In India, for instance, or in Palestine, where a body of non-European law has been recognized, the basis of its recognition has been the religious community of its adherents. In such circumstances it would be the rare exception, not the normal rule, for a litigant to have combined in his conduct elements of two different systems of family law. One would not expect to find that Hindus or Jews had, while maintaining their traditional habits, also adopted a certain custom from Mohammedan or English law. No doubt provision is made for the man who does not care to be counted a Hindu or a Jew. He in effect contracts out of his religious community and then falls under English law, just as the resident Englishman does.

But the recognition of Native law in Africa cannot be put on a similar basis except, of course, where, as in parts of Nigeria, Mohammedan law is entrenched. African Native law means the immemorial customs of local groups. In some respects these customs are tough and tenaciously observed ; but in other respects they are fragile and easily abandoned or drastically modified under the pressure of European influence. The law of marriage illustrates a common problem here. An African can marry by Christian rites, i.e., under the Common law, as no Hindu in India would normally do. When an African chooses to

do so, to what extent does he abandon his duties under Native law, particularly where by doing so he would deprive a third party of certain rights? Thus a marriage by native law is usually validated by the gift of cattle which passes from the bridegroom (or his father) to the father of the bride. If an adult bride and bridegroom choose to marry under the Common law, can the bride's father claim the cattle due to him under Native law? If he does so after the marriage, and the husband refuses to pay them, is the wife justified in deserting him on the ground that he has made the marriage intolerable by his refusal to meet her father's claim?[2]

Second only to the conflict of Native and European law is the conflict that occurs between the various bodies of tribal laws. Cases involving such conflicts have increased through the migration of Native labour which now takes place on a large scale. African men attracted by the work and wages offered by mining industries and other forms of economic enterprise are travelling long distances from their homes. In all the bigger centres of Southern, Eastern, and West Africa there is to-day much inter-tribal mingling of races. On the Witwatersrand and on the copper belt of Rhodesia it is certainly true, as it was in medieval times, that " five men, each under different personal law, may be found walking or sitting together."

On this aspect of the subject it must suffice to say that the rules supplied by the Conflict of Laws are scarcely adequate to so complex a situation.

There is yet another complication. The customs recognized as Native law are ancient ones. But in actual fact many of these customs, or certain features of them, are changing as the social and economic conditions of Native life change. Nowhere in the world has social change been as swift and as far-reaching as it has in Africa in the last two or three decades. Where customs of marriage or family life have undergone significant change, which form of the custom shall the Courts recognize as Native law? Shall they countenance only the practice of the oldest generation? Or shall they seek to find current or contemporary custom in the practice of younger people? They will probably be tempted, as in South Africa, to do the first. If they do, they can, where necessary, use well-established legal methods of recognizing a local custom as law.[3] But they will thereby run the risk of making law equivalent in the eyes of the younger generation to old-fashioned and out-moded custom, if not to vested interest in the vanishing past. It is harder for the Courts to choose on occasion the second alternative and recognize changes in custom. If they do, however, they might well adopt the tests which English and South African Courts apply before they uphold as law trade usages, such as the practices of stockbrokers or auctioneers, which are a form of modern mercantile custom.

Marriage is the central institution around which Native law revolves. The majority of Natives marry according to Native law or custom, but the number who marry by Christian rites under the Common law was never negligible, and it is growing fairly rapidly. In the old Cape Colony marriages by Native law were refused recognition. The judges have been severely criticized for this refusal by administrators and anthropologists who believed that it was due to judicial ignorance of the part played in Native marriage by the transfer of cattle. Closer inquiry, however, discloses the fact that the reason for the refusal to recognize Native marriages was not simply a mistaken belief that they involved purchase and sale of the woman. The main reason was that the Legislature had not at that time empowered the Courts to recognize Native law, and consequently they

[2] The psychological factor is important. Without any understanding of the legal issues, most Native women in South Africa would feel themselves not properly married unless cattle or their equivalent had been paid. The question has arisen more than once in South African courts, and there are now conflicting decisions.

[3] I discussed the ways of proving a custom in my article in this journal in 1938.

had no power to recognize Native marriage which was an integral part of Native law. In these circumstances the Courts really had no option but to regard the transfer of cattle as consideration offered for the immoral purpose of cohabitation with a woman, and they acccordingly declined to enforce such contracts or rights that arose out of them. No doubt there are cases on record in which the judges displayed a Victorian aversion from any other form of marriage or morals than that to which they were themselves accustomed. But, at least equally, there are cases on record in which the judges showed as penetrating an insight into Native custom as any anthropologist.[4] What led them to decide against recognition were rules contained in an established part of the Common Law which they were bound to uphold. These rules are still part of the Common Law, although now, as in the nineteenth century, judicial opinions differ about the way to interpret or enforce them in any particular case.[5]

Nor does the recognition of Native law settle the matter. When South Africa belatedly recognized Native law in 1927, recognition took the usual form of authorizing the Court to apply Native custom where it thought fit. At the same time it was expressly stated in the statute that *lobolo* or cattle-dowry cases were not to be refused a hearing on the ground that the custom was repugnant to morality.[6] It is significant of the recurrent failure to foresee the main problems in recognizing Native law that this statute, though designed to make reparation for the thoughtless past, itself failed to define the vital relation of marriage by Native law to marriage under Common law. For it is not enough for the Legislature to recognize the Native form of marriage. Having regard to the known tendency of Natives to combine European and Native habits of life, it is essential for lawyers to know whether a Native already married by Native law can marry another woman under Common law without being divorced. South Africa finally settled this question by an amending Act in 1929, which made clear the relation between the two forms of marriage. A man who is married under the Common law cannot, during the subsistence of his marriage, contract a valid "customary union," as marriages by Native law are now called.[7] The same principle has been adopted by legislation in most of the British colonies in Africa.[8] But neither in the Union nor in British Africa has legislation yet clarified the position of a man who, being married by Native law, proceeds to marry another woman under the Common law. It is assumed in practice in the Union that the first marriage is dissolved by the second ; but it is hard to say what rights, especially of inheritance, remain to the wives and children of the first marriage, which would often have been polygamous. This situation is not simplified by the lack of registration (except in the Province of Natal) of both marriage and divorce by Native law.[9]

Linked with marriage is the law of inheritance. Although Africans marry readily enough under the Common law, they would normally prefer that their property should be inherited not according to European law but according to the customary rules of Native law. This desire was recognized in the old Cape Colony by statute as long ago as 1864,[10] and it has also been respected by the

[4] See, for instance, the remarkable judgment of Mr. Justice S. T. Jones in *Nbono* v. *Manoxoweni*, 1891, *Eastern Districts Courts Law Reports*, Vol. 6, pp. 62–99. Another case is reported in 1 E.D.C. 195 (1880).

[5] Cf. *Harvard Law Review*, Vol. 54, pp. 473–482 (1940–41) on Marriage, Contracts, and Public Policy.

[6] Native Administration Act, No. 38 of 1927, s. 11.

[7] Act No. 9 of 1929, s. 9.

[8] For the references, see my article in the *Modern Law Review*, Vol. III, pp. 48–52, June, 1939.

[9] The essential elements in marriage and the grounds of divorce under the main branches of Native law in South Africa are described in my article in *Bantu Studies*, Vol. XV, pp. 13–23 March, 1941.

[10] Native Succession Act, No. 18 of 1864.

Union.[11] But the practical difficulties encountered in the administration of such a law have been considerable. For one thing, under Native law women do not inherit under any circumstances. Yet in these modern days when a man and wife have married under the Common law and lived as Christians, probably quite apart from his relatives, the widow is not content to allow all her deceased husband's property to pass to his brother or some more remote male relative, even though this successor is in Native law under an obligation to support her if she agrees to live with his household group. Cases of obvious hardship are regularly reported and they have given rise to a demand for some alteration in the present law.[12] Africans in the Union are by statute entitled to make wills,[13] and a slowly increasing number of them do so with the assistance of solicitors. The root of the problem here, however, is uncertainty about how far the normal incidents and consequences of a Christian marriage under the Common law should be attached to Africans who contract such a marriage rather for religious reasons than because they intend to put themselves wholly under European law.

The contact and conflict of two different systems of family law within one country is bound to produce social and legal problems of an intricate kind. South Africa's century of experience provides ample evidence of this fact. If the British dependencies in Africa have not yet had to meet the full range of these problems, it is mainly because, under the policy of indirect rule, the great bulk of litigation between Africans has been left for disposal by Native Courts with only the most perfunctory supervision by British administrative officers, who are usually men without a full legal training. To-day civil cases from these Courts rarely reach the High Courts, whose decisions alone are published. But as Africans are drawn more and more into the European economic system, and as they rise in the economic scale, their desire and ability to take cases on appeal from the lower Courts will increase, as it has done in the Union, and there will always be lawyers at hand to encourage this desire. It is therefore unlikely that British Africa will be spared the necessity of facing the legal problems that have already confronted the Union.

The obvious way of solving some of the problems indicated is by legislation. Hitherto, however, an alien government has shrunk from the task of regulating by law the domestic customs of its subjects. It has preferred to leave the effort to the vagaries of judicial decision, which is less open to popular criticism. But such a policy is exposed to another danger, one that has shown itself recently in South Africa. Free to develop Native law, the Native Appeal Court (which is manned by European judges) has allowed some important decisions to be influenced by an avowed anxiety to pursue a policy of " legal segregation " in harmony with the general policy of political, social, and economic segregation of Africans that has hitherto prevailed in the country. Almost unobserved, it has tried to turn away from the old Cape objective of assimilating Native and European law into one common legal system. How far it will succeed in this departure from earlier tradition it is too early to say. But the mere attempt illustrates the wisdom of the warning on this subject that Macaulay issued to his countrymen more than a century ago.[14]

In urging the need for codification in India, Macaulay pointed out that the state of the indigenous law was such that the alternative was to let " everything depend on the temper of the individual judge."

" Even in this country," he said, " we have had complaints of judge-made

[11] Native Administration Act, 1927, s. 23, and Regulations issued in the form of Government Notice No. 1664 of September 20, 1929.

[12] See the discussion in the Native Representative Council, 1940, reported in *Proceedings*, Vol. II, pp. 287–296.

[13] Native Administration Act, 1927, s. 23 (3).

[14] See his speech on the Government of India in the House of Commons, July 10, 1833. It is in *Selected Speeches*, edited by G. M. Young (1935).

law ; even in this country where the state of morality is higher than in almost any other part of the world ; where, during several generations, not one depositary of our legal traditions has incurred the suspicion of personal corruption[15] ; where there are popular institutions ; where every decision is watched by a shrewd and learned audience ; where there is an intelligent and observant public ; where every remarkable case is fully reported in a hundred newspapers ; where, in short, there is everything which can mitigate the evils of such a system. But judge-made law, where there is an absolute government and lax morality, where there is no Bar and no public, is a curse and a scandal not to be endured."

Macaulay went on to explain that he did " not mean that all the people of India should live under the same law: far from it. . . . We know how desirable that object is ; but we also know that it is unattainable. We know that respect must be paid to feelings generated by differences of religion, of nation, of caste. Much, I am persuaded, may be done to assimilate the different systems of law without wounding those feelings. But, whether we assimilate those systems or not, let us ascertain them ; let us digest them. We propose no rash innovation ; we wish to give no shock to the prejudices of any part of our subjects. Our principle is simply this: uniformity where you can have it ; diversity where you must have it ; but in all cases certainty."

Macaulay supported his plan by another argument. He believed that " a code is almost the only blessing, perhaps it is the only blessing, which absolute governments are better fitted to confer on a nation than popular governments. The work of digesting a vast and artificial system of unwritten jurisprudence is far more easily performed, and far better performed, by a few minds than by many, by a Napoleon than by a Chamber of Deputies and a Chamber of Peers, by a government like that of Prussia or Denmark than by a government like that of England. A quiet knot of two or three veteran jurists is an infinitely better machinery for such purpose than a large popular assembly divided, as such assemblies almost always are, into diverse factions. This seems to me, therefore, to be precisely that point of time at which the advantage of a completely written code of laws may be most easily conferred on India. It is a work which cannot well be performed in an age of barbarism, which cannot without great difficulty be performed in an age of freedom. It is a work which especially belongs to a government like that of India, to an enlightened and paternal despotism."

Macaulay's speech and his political influence accomplished his purpose. In the latter half of the nineteenth century four Law Commissions visited India in order to advise on the codification of its laws. The personnel of these Commissions included men like Macaulay, Lord Romilly, Mr. Justice Willis, and Mr. Justice Lush, while Maine and Fitzjames Stephen also shaped policy as law members of the Viceroy's Council. The task was, however, never fully completed. But no one doubts that the laws of India are much the better for the effort inspired by Macaulay. In Africa the obstacles to such reform are considerably less than they were in India, mainly because Native laws are not fortified, as in India, by strong religious feelings. The recording and unification of Native laws and customs over wide areas is a project that should not be delayed after the end of the war. What Britain did for India in the nineteenth century is the least she can do for Africa in the twentieth.

[15] There is, of course, no suggestion that judges or magistrates either in the Union or in British Africa are ever open to improper influence. Whether the same can be said of Native Courts is another matter.

ADMINISTRATIVE ADAPTATION IN A CHANGING WORLD.

[*Contributed by* A. J. WALDEGRAVE, ESQ.]

THAT we live in a changing world is a commonplace. The world is always changing. But there seem to be periods, and our own time one of them, in which the movement is accelerated and becomes catastrophic, so that history records them as specially periods of transition. A feature of the upheaval which we ourselves are experiencing has without doubt been the shaking given by the great depression of 1929, and the following years, to confidence in those conceptions of social and commercial relationships on which the industrial development of the nineteenth century was based. Some of the central ideas of that expansive and optimistic century were suddenly found to be not, after all, the eternal principles of progress and happiness which to most (though there were never wanting prophetic dissenters) they had seemed. The painful events of those years of depression and the change of outlook accompanying them have inevitably brought also changes in the sphere of government and of thought about government. In fields which *laissez-faire* had placed out of bounds government action became necessary, sometimes with all the defects of improvisation; and reflection, theorizing, and speculation have followed action.

The impact of the problems of the depression on government and administration in America has led to a considerable output of literature on the subject, and one welcomes the publication of a book by Schuyler C. Wallace, Professor of Government in Columbia University, entitled "Federal Departmentalization: a Critique of Theories of Organization,"[1] in which much of the recent experience and thought is ably and judicially brought under review, and is related to the investigation of fundamental principles in government and administration. In discussing current developments and trends, Professor Wallace traces several of the streams of influence which have their source in pre-depression days, and three of these streams appear to have particular interest in considering the channel along which administrative theory and practice should be directed.

One of these streams owes its character to its having originated in the days of American expansion and prosperity, when the technique of business organization had become a matter of intensive study. To the average American in those days, business was a religion—his only religion, the cynic would say, though as usual the cynic would be wrong. But the citizens of the United States did take business very seriously, and gave earnest, even solemn, attention to questions of office and works organization, sales promotion, efficiency tests, the relations of holding companies to their subsidiaries, and so forth. Round these subjects quite a literature grew up, and universities were ready to include the study of them in their curricula. Such studies have naturally influenced the minds that have lately been turning, with a broader outlook, to the consideration of problems of government and administration, and have contributed to it a valuable body of experience gained in the sphere of business organization.

A second element deriving from earlier days is associated with the discovery that, even then, private enterprise and free competition could not be allowed to operate without some interference by the Government. Firm as was the general belief in the virtues of *laissez-faire* and rugged individualism, there were points at which intervention and supervision in the interest of the community

[1] Columbia University Press, New York; Humphrey Milford. Pp. ix, 251. 18s. 6d.

obviously became necessary. Anti-trust laws were passed, Public Service Commissions were established in practically all the separate States, and the Interstate Commerce Commission, with wide powers over transport arrangements and charges, was set up by the Federal Government. The regulatory action of the government as exercised through commissions of this kind has, however, been jealously watched by the business interests affected or threatened, and the controls have been exercised in a litigious atmosphere, always heavy and sometimes stormy.

This watchfulness has not sprung entirely from motives of self-interest. Concern for the preservation of individual liberty, emanating from veneration for the American Constitution and reinforced by an honest if uncritical belief in the social beneficence of the unrestrained pursuit of personal gain, has constantly raised barriers to any proposed extension of the functions of the Executive, and has endeavoured to maintain strict separation of State powers into the three categories, legislative, judicial, and executive, appropriate to the simpler world of the late eighteenth and early nineteenth centuries.

Not quite consistent with this rigid attitude has been the growth of a third element in the relations between the governed and the Government. This is the development of what have come to be known as " pressure groups." In spite of the efforts to restrict government activity to a minimum, there have all along been regions in which legislative and administrative action has been desired by various interests, usually in conflict with other interests; and organized pressure, not always of a reputable kind, has become a standing feature of American political life. It should be noted, however, that, as Professor Wallace remarks, pressure groups do not always represent self-regarding interests, but sometimes exist to stimulate and support government action in directions socially desirable, or, at any rate, regarded as such.

These several older streams of influence have brought their contribution to the greatly changed conditions in which government is now called upon to function; for, whatever their origins and motives, in each was implicit a demand for one of the essentials of good government and administration. These demands may be classified as efficiency, responsibility, and responsiveness—there being a real distinction in significance between the last two terms, despite their etymological similarity. Now that the river has become a flood (if the metaphor may be continued thus far), these three factors remain of outstanding importance. Quite apart from the war, the stream of government activity is indeed swollen. The Report of the President's Committee on Administrative Management in the Government of the United States, issued some four years ago, surveys over a hundred separate departments, boards, commissions, corporations, authorities, agencies, and activities through which the work of government is carried on; while a glance at the list of Government and Public Officers in *Whitaker's Almanack,* occupying as it does some fifty pages, is sufficient to indicate the wide and intricate ramifications of government in Britain. In addition there is the great expanse of local government.

Not all the new departments, boards, etc., either in America or Britain, are the direct consequence of the depression of 1929, but practically all of them reflect the development of the closer relations between government and the economic world which is so prominent a feature of our time. As examples of the kind of change that has been taking place, reference may be made to two articles in a recent issue of *Public Affairs,* a vigorous journal published by the Institute of Public Affairs at Dalhousie University, Nova Scotia, which has for its object a linking of the study of public administration with the affairs of the actual world in which this administration is called upon to function. One of these articles describes the Food-Stamp Plan in operation in the United States. This plan was introduced to relieve distress and at the same time

enable farmers to dispose of some of those surplus stocks which have brought on modern civilization the reproach (not, however, applicable in the all-embracing way imagined by many of those who bring it) of tolerating " poverty in the midst of plenty."

The plan works thus: " Participants buy orange-coloured stamps in amounts intended to cover their normal level of expenditure for food. These stamps can be used to buy any kind of food. Having bought their orange stamps, participating families are given, free of charge, blue stamps in amounts proportioned to their purchases of orange stamps. Blue stamps will buy only a restricted number of foods—those on the surplus list as announced by the Secretary of Agriculture." The blue stamps average in value about half the amount of the orange stamps. (No doubt the plan is being made obsolete by the war.)

The second article referred to is on " The changing relationships of State and Municipal Government in New England," and it gives an account of the operation of the Maine Deorganization Act. This Act is designed to deal with the social problem which in Maine, as in Canada, has arisen where " local communities have built their economies about lumbering " and where " the denuding of the forests has deprived these towns of livelihood." This problem is, of course, the same as that following soil erosion, the effort to deal with which has produced the much-discussed Tennessee Valley authority, an outstanding example of a bold and far-reaching experiment in administrative adaptation in a changing world.

These are but random examples of the kind of development which is leading to the multiplication of administrative authorities. In the United Kingdom we have seen the extension of government activity in many directions, the mention of social insurance, public health, resuscitation of agriculture, housing, town-planning, unemployment, foreign exchange, transport, broadcasting, and electricity supply being sufficiently indicative of the fields in which new or extended action has been taken and more is contemplated. In this country administration of the new activities has mostly been provided for by enlarging the scope of old departments. But whether old departments are expanded or fresh authorities set up, it is not unimportant that efforts such as that of Professor Wallace should be made to elucidate the underlying principles of good administration so far as they may be found (or be found missing) in the handling of the new situations and problems.

Too often the issues are beclouded by vague if virulent denunciations of all extensions of administrative activity as a growth of " bureaucracy," with the assumption that this is hateful even where it is inevitable. When complaints of bureaucracy are analysed they usually boil down to two indictments, either of which may be true, but which cannot both be true of the same set of persons and conditions at the same time; for one is the charge of inertia and complacent devotion to routine, while the other is that of encroachment, self-aggrandisement, and undue activity. It is not, however, sufficient defence against such accusations to point out the inconsistency so often obscured by the indiscriminate use of the term bureaucracy. What is important is that neither indictment should hold, and that the danger of both evils should be reduced to a minimum. At the same time it is well to have a clear understanding of the need for distinguishing between them; for the reduction of one involves the risk of growth of the other. Abolish orderly constitutional procedure and you may encourage the exercise of arbitrary authority; try to impose restraints on the abuse of power and you may find that you are paralysing action.

The common complaint in Great Britain is of slow and roundabout methods of procedure, lack of energy and drive, and a general inability to " get a move on." An unnecessary multiplication of forms, with their dotted lines, is usually part of the charge. So far as these charges are well founded they may have

their roots in an excessive concern for correctitude of procedure and uniformity of treatment—an over-emphasis, that is, of one of the essentials of good government. On the other hand, they may be due to simple inefficiency somewhere in the administrative machine. Efforts to locate faults and apply remedies should be a constant feature of departmental activity, as indeed they are; and they should be stimulated by persistent criticism from outside, for only the wearer knows just where the shoe pinches. But it would help to prevent mistakes within and misunderstanding without, if there were a general appreciation of the leading principles to be followed in the pursuit of a sound public administration, suitable for the inevitable developments of the time. Uncritical denunciation of expansions as a growth of bureaucracy will not assist in making the public services as efficient and beneficent as possible.

A better grasp of some of these principles may perhaps be gained by examining a little further the significance of the three demands mentioned above as arising in administration in some of its earlier phases, namely, demands for efficiency, responsibility, and responsiveness.

First, as regards efficiency. Slackness and stodginess, the latter term covering mechanical routine, are no more necessary or excusable in the government and municipal services than elsewhere. Those services certainly cannot claim a monopoly of these undesirable qualities, but in so far as they exist the remedy is the cultivation of a genuine zeal for efficiency, in the business sense of the word, with a better understanding, especially among those in the higher posts, of what this involves and where it beckons. It is very much a question too of the study of good technique. Concern for efficiency demands the elimination of all that can justly be stigmatized as red tape; the overcoming of the inertia which may arise from the absence of competition or from a sense of privilege and security; the abolition of nepotism and favouritism; the adoption of forms of organization which avoid friction and duplication; the use of the best methods of recruiting, grading, and training staff; the establishment of cordial relations with Staff Associations and on Whitley Councils and Committees; the encouragement of initiative and enterprise in the lower ranks as well as in the higher; the devising of systems of promotion which provide adequate incentive and ensure able supervision and direction with a minimum of soreness and dissatisfaction; the discovery and adoption of the best processes in office and other work; the employment of costings and statistical measurements of output wherever these are appropriate; the avoidance of official jargon; exercise of the team spirit internally, and co-operation in that spirit with other departments; in a word, the making of efficiency an end in itself, while recognizing that it is never a final end. If it be objected that this cannot be done without the profit motive, the answer is that it is being done over a large part of the administrative field and that the problem is not that of proving its feasibility but of extending its operation to the whole of the field.

A task of this kind requires for its actual accomplishment qualities of a high order in those in controlling positions, but as a programme it is straightforward and, for the most part, free from entanglements of mutually contradictory objectives. When, however, we come to the second-mentioned element in public administration, that of responsibility, we find that entanglements of this kind do exist and make on departments and their directors demands which are more involved. For it is here that policy and politics enter into the sphere of administration and bring complications. Not the least interesting feature of Professor Wallace's study of Federal Departmentalization consists in the light it throws on the effect of the differences between American and British political institutions on the actual administration of the affairs of government—differences between Congress and Parliament, between President and Premier, and between the two sorts of Cabinet. On the whole the British institutions seem to work more

smoothly, if not in the end more successfully. Some of the differences are striking; it comes as a surprise, for example, to learn that in the United States there is nothing corresponding to the provision for the criticism of administration which is afforded by question-time in the House of Commons.

In England, the liability of a department to find that its action (or inaction) has provoked a " question in the House " is the foundation of a good deal of the procedure typical of government departments which the impatient critic denounces as red tape. A certain stiffness in working is inevitable when a department must be prepared not only to answer for all its doings, including those of remote and subordinate officers, but must take care that it acts with uniformity, treating all persons alike, and, moreover, that it keeps within the powers committed to it under the constitution and the law. These obligations are, of course, no excuse for timidity and procrastination, but they do make for caution; and naturally it is a hindrance sometimes to rapidity of action and the exercise of a broad discretion to know that a modest mistake may be pilloried in Parliament as an outrageous blunder.

But these conditions are the price paid for freedom from the dangers of tyranny and arbitrariness. They mark the responsibility of the minister and the department under him to Parliament and the whole nation. They are the safeguard against bureaucracy in the sinister sense of the word, as representing the efforts of those in authority to maintain and enlarge their power for their own gratification and to make themselves answerable to nobody but themselves. It is important that there should be adequate protection against usurpation of this kind, but it is also important that the safeguards should not lead to rigidity of organization, weakness and delay in operation, and inability to meet changing conditions with the necessary adaptability.

As in America, so in Britain, there have been movements among members of the legal profession to oppose the introduction into the processes of government and administration of certain features designed to give greater flexibility, on the ground that these threaten the foundations of freedom and justice. The critics say that there is growing up, in the hurry of modern life, a system of allowing government departments to acquire semi-legislative and semi-judicial functions, subversive of the rights and liberties of the citizen. The outstanding feature to which they object is the delegation by Parliament of power to make regulations having the force of law, the department which makes the regulations exercising also the function of deciding on their interpretation and applicability in individual cases.

This watchfulness in the interest of ancient rights and personal freedom deserves the greatest attention and respect, but it is not to be assumed that the tendency to which exception is taken and against which warnings are issued springs from self-aggrandising bureaucracy or from indifference to the principle of responsibility in administration. It is part of the problem of the changing world and the growth of government functions in range and complexity.

Some light may be thrown on the situation in which the dangers, if dangers they be, arise, by turning to a consideration of the last-mentioned element found flowing into the channel of administrative activity, that of responsiveness. " Pressure groups " have already been mentioned; and another American expression, the " spoils system," is also of interest in this connection. The spoils system, that is, the practice of filling administrative posts by political patronage, had its origin, in part at any rate, in the desire of the leaders of political parties for an assurance of sympathetic administration of the programmes to which they had pledged themselves when seeking election. Government must give the people what they ask for and be quickly responsive to public opinion and desire. But the corruption and incompetence bred by the system became an obvious scandal; and from time to time, in the establishment of boards and commissions,

various devices have been adopted with the object of protecting them from direct political control. There is a strong feeling, however, that it is possible for such boards and commissions to become too remote from public influence and too much out of touch with developing needs and trends. That the same tendency to aloofness has been felt in this country is shown by the step taken to correct it in the appointment of " public relations officers " in a number of departments.

Responsiveness to the needs and wishes of the community is made more necessary by the change which has been taking place in recent years in the kind of activity undertaken by governments. Formerly the function of government in the world of economic and social affairs was mainly regulatory: to-day, to adopt a convenient adjective used by Professor Wallace, it is largely promotional. And there is every likelihood that in many of the fields which government activity has occupied under the pressure of the practically totalitarian regime imposed by the present war, it will be continued—certainly in connection with the social services, and to an unforeseeable extent in connection with agriculture, industry, and commerce. Among the promotional services must be included the public utility undertakings which come under State or municipal management or control.

Now a technique of administration suitable for the regulatory functions, in exercising which care had to be taken not to go too fast or too far, may prove to be unsuitable for the promotional functions, where initiative, drive, rapid investigation, sympathetic understanding, far-reaching imagination, and things of that sort are required, and where sometimes a sense of needs must be awakened and the formation of standards encouraged. If the older liberties and rights of the individual are to be protected, it must not be by obstructive methods which hinder the development of those freedoms which are a social product, a continuing creation, conferring wider scope, greater opportunity, and a fuller life throughout the community.

In seeking to achieve the application of the principle of responsibility in the administrative world of to-day and to-morrow, in such a way that it will not unduly interfere with efficiency and responsiveness, it would be well to consider the point to which Lord Stamp directed his first presidential address (now, alas! never to be followed by another) to the Institute of Public Administration.[1] The subject of the address was " The Administrator and a Planned Society." In it Lord Stamp reviewed the changes which have been taking place in the character of the public services, so that the official is now " less concerned to administer law than to promote energetic and far-reaching projects," and he proceeded to develop the theme that the change demands the emergence of a new type of official, and that we should be giving more attention to the question of how to produce him. It is, he said, largely a question of a change of temper, spirit, and attitude on the part of officials, and of the creation among them of a fresh conception of the nature of their problems and duties.

May it not be that a similar change of approach is desirable in the criticism of public administration, especially on the part of those in legal circles? In the new conditions, it appears necessary to recognize that insistence on constitutionalism and the due observance of the principles of law and justice should not lead to the advocacy of methods of administration which, in seeking to avoid the evils of bureaucracy that lie in temptations to the exercise of arbitrary power, would magnify those that consist in the tendency to stiff and cumbrous procedure. The critic should himself bring a lively understanding of the necessity for business-like efficiency and quick responsiveness in the administrative world, and should seek to co-operate in developing a technique of administration which will promote these qualities and at the same time ensure the maintenance in ministers, departments, and authorities of full responsibility to the sources in

[1] Printed in " Public Administration," January, 1938.

law, justice, and constitutional expression of the common will, from which their power is derived. And the administrator should make the necessary advances from his side in devising safeguards which will be effective without being obstructive.

In Professor Wallace's study of Departmentalization there is emphasized the point that the main problem is to combine with the specialization for which departments exist the capacity for co-ordination with other departments in pursuing common ends. The very virtues of enthusiasm among departmental heads, and of loyalty to chief and department among members of the staff, place obstacles in the way of a wider outlook and ready co-operation. It is all too easy to develop the departmental mind; and critics of government and administration should try to make sure that they themselves resist the temptation and do not bring to bear, particularly in rapidly changing conditions, a specialized view, say that of the lawyer, and press it in an unaccommodating way. The exigencies of administration in the modern world and the standing principles of law and liberty need to be co-ordinated, and this co-ordination demands a right approach both by the administrator and his critics. With this, methods of reconciling responsibility and responsiveness, and at the same time promoting efficiency, can assuredly be evolved.

LEGISLATION IN EXILE: CZECHOSLOVAKIA

[*Contributed by* Dr. Egon Schwelb.]

It is not within the scope of the present survey of Czechoslovak legislation in exile to deal with the constitutional problems confronting the exiled organs of a democratic State when the legislative bodies are prevented from meeting.[1] Nor is it intended to examine the questions of private international law arising out of the legislation passed on foreign soil. The following is a report on the positive enactments passed by the President and the Government of Czechoslovakia since their establishment on English soil in July, 1940.

A Statutory delegation of legislative power, applicable in cases of emergency similar to conditions obtaining at present, is contained in sec. 138 of the Czechoslovak Defence of the State Act, 1936 (No. 131). Coming into operation when the mobilization of the armed forces has been ordered, or when a state of war has been proclaimed, or war has been declared, sec. 138 provides that, in order to meet the requirements of the extraordinary situation created by the armed preparedness of the State, the Government, with the concurrence of the President of the Republic, shall be authorized to issue Orders concerning matter for which otherwise Acts of Parliament would be required. This authority does not include the power to legislate in constitutional matters.

So far, the Czechoslovak Government abroad have not availed themselves of this enabling provision. As will be seen, a novel method of issuing the requisite emergency provisions has been adopted which, independently of positive pre-Munich law, seeks the solution in original, creative, revolutionary legislation:

A "Constitutional Decree" was issued by the President of the Republic on October 15, 1940 (*Czechoslovak Official Gazette*, 1940, No. 2), regarding "the temporary exercise of legislative power." Sec. 2 of this decree lays down that

[1] Literature on the legal position of the Allied Governments established in the United Kingdom: Arnold D. McNair, "Municipal Effects of Belligerent Occupation," *Law Quarterly Review* (1941), 67–73; Viscount Simon and Dr. J. M. de Moor, "The Allied Maritime Courts," *Law Quarterly Review* (1942), 41–52; Viscount Simon, "Foreign Maritime Courts," *The Journal of Comparative Legislation* (1942), 1–5; Dr. Manfred Lachs, "Polish Legislation in Exile," *ibid*, 57–60; Alfred Drucker, "The Legislation of the Allied Powers in the United Kingdom," *Czechoslovak Year Book of International Law* (1942), 45–59; Ed. Táborsky, "The Constitutionality of Official Acts of Allied Governments and International Law," *ibid*. 190–195; the present writer's "The Jurisdiction over the Members of the Allied Forces in Great Britain," *ibid*. 147-171.

provisions through which laws are amended, rescinded or newly enacted, will, for the duration of the provisional State machinery, *i.e.* so long as Parliament cannot meet, be issued in urgent cases by the President of the Republic at the instance of the Government in the form of Decrees. These legislative powers of the " President in Council " are not limited to the issuing of so-called simple laws. They extend also to the making of laws (decrees) amending the Constitution. Although this is not stated expressly, it follows from the content of the Decree which itself modifies the provisions of the Constitution for the duration of the emergency.

On July 21, 1940, the then Foreign Secretary, Lord Halifax, wrote to Dr. Benes that " His Majesty's Government in the United Kingdom are happy to recognize and enter into relations with the provisional Czechoslovak Government."[2] On July 18, 1941, an official communiqué was issued from 10, Downing Street, announcing the decision of His Majesty's Government in the United Kingdom to accord full recognition to the Czechoslovak Government, and of the King's decision to accredit an Envoy Extraordinary and Minister Plenipotentiary to Dr. Benes as President of the Czechoslovak Republic.[3]

When recognizing the Czechoslovak Government as a provisional Government, when according them full recognition a year later, inviting them, as well as all other Allied Governments, to constitute themselves in Great Britain to establish their State machineries in this country, and to maintain armed forces ; when concluding with them International Agreements[4] and offering to conclude such agreements in future,[5] the British Government were aware that to implement this programme certain modifications in Czechoslovak municipal law and the passing of new legislation would be inevitable. They were informed of the constitutional position of the Czechoslovak and all other exiled Governments of democratic States. International recognition was accorded to the exiled Governments by the British Government and legislation relating to the presence on British soil of Allied Governments and Allied armed forces,[6] was passed by the British Parliament in cognizance of the facts that the Belgian King is a prisoner-of-war, that the Belgian, Netherlands and Czechoslovak Parliaments cannot meet in England, etc.

From this it follows, I submit, that the full recognition of, *e.g.* the Czechoslovak President and Government comprises their recognition in the legal position in which they are constituted in England, *i.e.* in their capacity as the lawful head of the State and the lawful Government of the Czechoslovak Republic, exclusively competent to exercise all those functions—legislative, administrative, and other —that appertain to them by virtue of their constitutional position in England. In support of this view a number of British statutory provisions can be adduced :

The Allied Forces Act, 1940, provides that, *a.o.*, the Czechoslovak Military Courts may exercise within the United Kingdom in relation to members of the Czechoslovak Forces in matters concerning discipline and internal administration, all such powers as are conferred upon them by the law of Czechoslovakia.[7]

[2] For Documents see *Cz. Y.B.* (1942) 231.

[3] *Ibid.*

[4] British-Czechoslovak Agreement concerning the Czechoslovak Armed Forces, October 25, 1940 ; British-Czechoslovak Financial Agreement, December 10, 1940 ; the texts have not yet been made public, see *Cz.Y.B.* (1942) 235 ; Agreement regarding the Registration of Czechoslovak Nationals for the International Labour Force : The International Labour Force (Registration of Czechoslovak Nationals) Order, 1941, S.R. & O., 1941, No. 723.

[5] The Joint Parliamentary Secretary to the Ministry of Labour (Mr. McCorquodale), regarding the application of the Allied Powers (War Service) Bill to Czechoslovak nationals, H.o.C., Official Report, vol. 380, No. 81, col. 2177, June 25, 1942 ; Lord Snell on the same subject, H.o.L., Official Report, vol. 123, No. 72, col. 932, July 21, 1942.

[6] Allied Forces Act, 1940, 3 & 4 Geo. VI, ch. 51 ; Diplomatic Privileges (Extension) Act, 1941, 4 & 5 Geo. VI, ch. 7 ; Allied Powers (Maritime Courts) Act, 1941, 4 & 5 Geo.VI,ch.21 ; Allied Powers (War Service Act), 1942, 5 & 6 Geo. VI, c. 29.

[7] Sub-s. 2, sec. 1, and the Allied Forces (Application of 23 Geo. V, ch. 6) (No. 1) Order, S.R. & O, 1940, No. 1818.

Annex III of the Military Agreement between the United Kingdom and Czechoslovakia of October 25, 1940, contains provisions which for their application presuppose the amendment of certain Czechoslovak municipal rules, *e.g.* the restriction of the competence of the Czechoslovak Military Courts to the members of the Czechoslovak land forces as distinguished from the airmen, who are subject to mixed British-Czechoslovak Air Force Courts, and the exclusion of trials for murder, manslaughter and rape from the competence of the Czechoslovak Military Courts.

An analysis of certain provisions of the Allied Powers (Maritime Courts) Act, 1941, leads to the same conclusions. Czechoslovakia, being a land-locked country and having no mercantile marine, no Order in Council applying sec. 1 (2) of this Act to her has been issued.

But, as the position in English law relating to the legislative powers of the Allied Governments differs only slightly, if at all, in respect of the different Allied Governments, the provisions of the Allied Powers (Maritime Courts) Act may serve as an illustration of the treatment of such legal questions as are of relevance in relation to Czechoslovakia. In order to establish the Allied Maritime Courts and to give effect to the provisions of the Statute in the municipal laws of the seafaring Allied countries which the maritime courts are to administer, it was inevitable to issue new and to amend some of the existing laws of the respective countries.[8]

A further point is this: British legislature, in full cognizance of the constitutional problems with which the exiled Governments of democratic States are confronted, enacted the following provision of sub-s. 4, s. 17, of the Maritime Courts Act:

"References in this Act to the law of any Power shall be construed as references to any such law for the time being in force by virtue of *any* Act, order, proclamation, *or other legislative instrument whatsoever* of the Government of that Power, whether passed, issued, or made before *or after* the commencement of this Act, and, in the case of a Power the Government of which is for the time being constituted in the United Kingdom, or in any territory to which this Act can be extended by Order in Council, whether before *or after that Government was so constituted.*"

Thus, the provisions of the Allied Powers (Maritime Courts) Act were applied to the Netherlands by Order in Council of May 30, 1941, S.R. & O., No. 799, although at the time of the making of the Order the decision of the Divisional Court in *re* Amand of May 23, 1941,[9] had made it clear that under the *written* Constitution of the Netherlands the Queen in exile, being deprived of the concurrence of the States General, has no powers to legislate, and that such powers were exercised by Her Majesty in consequence of the emergency conditions resulting from the occupation of her European territory.

An argument in support of my view can be based on sub-s. (2) of sec. 1 of the Allied Forces Act. This provision confers upon a foreign authority recognized by His Majesty as competent to maintain armed forces for service in association with His Majesty's forces the right to issue legal provisions. A foreign authority of this kind[10] may—by an Order made with the concurrence of the Admiralty or a Secretary of State, whether by reference to the present or former national law of the authority or otherwise—confer upon service authorities constituted in accordance with the Order all such powers as may be necessary to secure the discipline and internal administration of any forces so maintained.

[8] *E.g.* the Proviso of sub-s. 1, sec. 2; sub-s. 2, sec. 2; sub-s. 3, sec. 2; see the Netherlands Order in Council of October 3, 1941, *Staatsblad van het Koninkrijk der Nederlanden*, No. B.79; the establishment of the Norwegian Maritime High Court on November 7, 1941, *Law Quarterly Review* (1942), 50–52; the Polish Decree (September 30, 1941) No. 6, quoted by Dr. Lachs ubi sup. 60.

[9] *Cz.Y.B.* (1942) 172–178.

[10] "The Leader of Free Frenchmen"; the Allied Forces (Application of 23 Geo. V, ch. 6 (No. 2) Order, 1941, S.R. & O., 1941, No. 47, now "French National Committee, Directing Organ of La France Combattante," *Times* newspaper, 14.7.1942.

The insistence on the concurrence of the Admiralty or a Secretary of State in this case, emphasizes the difference which the law establishes between the organs of a sovereign State on the one hand, and a recognized, non-sovereign authority on the other. If, however, the constitutional position of the exiled Governments and their right to issue emergency enactments were not recognized by the English Courts, the Governments of sovereign States would be in a less favourable position than the French National Committee. Particularly in the case of Czechoslovakia the consequences would be absurd, considering that before the recognition of her *Government* in July, 1940, and July, 1941, the Czechoslovak peoples—as a consequence of Munich and subsequent events—were represented by the *Czechoslovak National Committee*, which had been recognized by France on November 13, 1939, and by Great Britain on December 20, 1939.[11] My contention, therefore, is that, unless we assume that the acts of recognition of July 21, 1940, and July 18, 1941, led to a deterioration, instead of an improvement in the international position of the Czechoslovak authorities—a result evidently contrary to the intention of the contracting Powers—their legislative power cannot be negated.

It ensues, in my view, that the result would be the same in a case coming under the rule in *Luther* v. *Sagor* [12], and in a case not covered by that rule. In either case it would have to be recognized that the Constitutional Decree of October 15, 1940, and any legislation deriving its validity from it, *are* "*Czechoslovak law*," *i.e.* part of *that* Czechoslovak *legal order*, which—irrespective of any changes brought about by acts of violence—has been *recognized* by His Majesty's Government to be *the only lawful legal order*, to the exclusion of any other, of the Czechoslovak Republic and of her authorities established in the United Kingdom. And this is the question of fact to be proved and decided in the English Court.

Some Enactments Passed in England.—A Constitutional Decree of July 21, 1940 (*Czechoslovak Official Gazette*, No. 1), amended by the Constitutional Decree of November 24, 1941 (*Czechoslovak Official Gazette*, No. 3, ex 1942), provided for the institution of a *State Council*, designed as an advisory body of the President of the Republic and a subsidiary controlling organ within the framework of the provisional State machinery. It consists of up to 50 members appointed by the President of the Republic, and debates and votes advisory reports and memoranda covering all branches of public administration. The State Council is conceived as a substitute for the Czechoslovak Parliament in its function as a representative body, but replaces Parliament neither in its legislative functions nor in its constitutional influence on inter-State relations. As pointed out above, the legislative function of the Czechoslovak Parliament is performed by the "President in Council" for the duration of the emergency (Constitutional Decree of October 15, 1940, sec. 2), while the consent of Parliament required for a declaration of war, the conclusion of peace and the making of certain types of international treaties is replaced by the consent of the Government (sec. 64, sub-s. 1, clauses 1 and 3 of the Constitution, sec. 1 of the cited Constitutional Decree).

The Decree of October 26, 1940 (*Official Gazette*, No. 4), regulates the *promulgation* of newly issued *legal provisions* in the *Czechoslovak Official Gazette*, which is published in London.

Under the Decree No. 5, 1940, *Field Courts Martial* and a General Court Martial (*Court of Appeal*) have been established, and through a further Decree (No. 6, 1940) certain provisions of the Czechoslovak Army Discipline Act (No. 154, 1923) have been amended. The organization of the Czechoslovak forces in Great Britain was regulated by the Decrees Nos. 9, 1942, and 10, 1942, the former introducing into Czechoslovak municipal law the provisions of Annex III of the British-Czechoslovak Military Agreement of October 25, 1940, dealing with the jurisdiction over the members of the Czechoslovak land forces. A number of

[11] For Documents see *Cz.Y.B.* (1942) 229–230.
[12] 37 T.L.R. 777. L.R. 3 K. B.532.

other Presidential Decrees (Nos. 7, 1942, and 8, 1942), Orders and Proclamations (Nos. 7 1940, 1, 2, 3, 7 ex 1941, 1 and 5 ex 1942) deal with military matters.

By the Decree No. 8, 1941, the Government were empowered to undertake the State security for deposits in the "Savings Bank of the Czechoslovak Army abroad."

Through the Orders Nos. 4, 1941, and 5, 1941, the "Czechoslovak *War Cross* of the year 1939" and the "*Medal for bravery in battle*" were created.

The Decree No. 10, 1941, regulates the legal position of the civil servants of the State machinery abroad, the Decree No. 11, 1941, invalidity pensions and allowances for families of fallen soldiers.

The Decree No. 2, 1942, provides for the institution of a *Ministry of Economic Reconstruction.*

Through the Decrees Nos. 9, 1941, and 4, 1942, the *Budgets* for 1941 and 1942 were enacted.

Two recent measures bear witness to the endeavour to maintain the Rule of Law, even in the difficult conditions of an exiled State machinery: one, the Decree No. 6, 1942, introducing into Field jurisdiction, *a.o.* the legal remedy known in Czechoslovak law as "*Appeal in safeguard of the Law*,"[13] the other the establishment of the *Czechoslovak Legal Council* by Ordinance of the President of the Republic of February 4, 1942.

The "*Appeal in safeguard of the Law*" of the Czechoslovak law of criminal procedure is the remedy exclusively wielded by the General Prosecutor (General Military Prosecutor) against any judgment, judicial Order or proceedings infringing or misapplying the law, that come to his notice. By this appeal the Supreme Court (Supreme Military Court) is called upon to decide in cases which, for whatever reason, have not been brought before it by the parties concerned. By the new Decree the Superior Field Prosecutor in London has been empowered to administer this special appeal, which is decided by a special enlarged Bench of the General Field Court Martial.

The *Legal Council* is a board of five members, appointed by the President of the Republic. It has been established "for the purpose of providing for the State machinery abroad an impartial legal advisory authority in lieu of the administrative judiciary which cannot be established here." Its function is to deliver legal opinions about the question whether or not any Order or decision of the Government or a central authority is in accordance with the Czechoslovak legal order. An application to the Legal Council can be made, *a.o.* by every Czechoslovak citizen upon whose rights the Order or decision has encroached. In addition, the Legal Council is called upon to give expert opinion on questions of future legislation.

Finally, I would like to mention a resolution, passed by the Czechoslovak Government, published in the *Official Gazette* of July 20, 1942, p. 12, concerning the *restitution of property*. It is not an enactment in the technical sense, but a statement of the principles of the Government's policy and of future legislation regarding this problem. The resolution proclaims that the Czechoslovak Government have never recognized, do not recognize, and will never recognize, any transfer or disposal of property, whether public or private, effected after September 27, 1938 (two days before Munich), under the pressure of the enemy occupation or the extraordinary political circumstances.

[13] zmatecní stíznost k zachování zákona (Nichtigkeitsbescwherde zur Wahrung des Gesetzes).

LEGISLATION IN EXILE: NORWAY.

[*Contributed by an official of the Royal Norwegian Ministry of Justice and Police.*[1]]

According to section 49 of the Constitution of the Kingdom of Norway of May 17, 1814, the legislative authority, under ordinary circumstances, lies with the Storting (Parliament), which is a people's representation consisting of 150 members elected by universal suffrage. When the Storting is not sitting, according to section 17 of the Constitution, the King, *i.e.* the King in Council, has a certain limited legislative authority. Laws made by the King, as authorized by the aforementioned provision of the Constitution, are known as "Provisional Decrees." They must not be at variance with the Constitution or laws issued by the Storting and apply provisionally until they are replaced by corresponding Acts made by the Storting or, failing that, until the termination of the next session of the Storting.

The authority for the King to enact provisions having legal power, without the constitutional sanction of the legislative body is, under the present circumstances, by virtue of the principles of constitutional emergency, amplified to embrace legal provisions of every kind.

The last time the Storting sat after the German attack on Norway had begun, it gave expression to the same interpretation of constitutional emergency by a special resolution which was issued at Elverum on April 9, 1940. Here the Storting unanimously granted the Government power to issue all the resolutions required to safeguard the interests of the State until such time as the Storting (after deliberation between the Government and the Storting's Council of Presidents) can be convoked once more.

The present Norwegian Cabinet, over which Mr. Johan Nygaardsvold presides as Prime Minister, was appointed in 1935. The Cabinet was composed of members of the "Arbeiderparti" (the Labour Party) which is the largest party in the Storting. Since the German invasion the Cabinet has been reinforced with members of the three other large political parties—"Höyre" (the Conservatives), "Venstre" (the Liberals) and "Bondepartiet" (the Agrarians).

It is evident from the foregoing that the Norwegian State is represented in the United Kingdom by the King and a Cabinet which has been set up in pursuance of the Constitution, and further, that the Government, in accordance with the Constitution—sanctioned by a special resolution of the National Assembly—has power to enact all the resolutions of a legislative nature necessary to safeguard the interests of the State during the war.

Even before the Government left Norway on June 7, 1940, and while the fight with the invaders was still in progress in different parts of the country, there were promulgated several Provisional Decrees of importance to the prosecution of the war and to the administration of the districts which were still free. Since the transfer of the Government to the United Kingdom some of these Decrees have acquired importance to the conduct of its normal work and for its effective contribution to the combined war effort of the United Nations. This applies to the Decree of April 22, 1940, relating to the monetary system and the Bank of Norway, etc. In section 11 of this Decree it is provided that holdings abroad which belong to banks or private persons domiciled in areas occupied by the German forces are vested in the Bank of Norway on behalf of the State, provided such holdings have not, prior to April 9, 1940, been pledged as security for and are not required to cover existing obligations or current business expenses, seamen's wages, insurance

[1] The name is not given for security reasons.

premiums, etc. The original holders are entitled to receive compensation in Norwegian currency within three months of the liberation of the occupied area in question. As will be seen, the Decree orders a general requisition, for the benefit of the State, of Norwegian assets abroad of the kind referred to in the provision. The object of this Order was twofold—firstly, to prevent the enemy from benefiting by the assets concerned; and secondly, to empower the Royal Norwegian Government to utilize them in the prosecution of the war.

More important still than the aforementioned Decree is that of May 18, 1940, relating to requisitioning of ships and ship-building contracts. Section 1 of this Decree provides that every Norwegian ship situate outside the area in Norway which is occupied by an enemy Power is considered as requisitioned for *use* by the Norwegian Government. In section 2 the Norwegian Director of Shipping in London is granted authority, on behalf of the Government, to take over *possession* of every ship as specified in section 1. He is further granted authority to take over the *ownership* of any such ship and, in the same way, to take over ships under construction outside the occupied area and contracts for the construction of ships when these belong to persons or concerns domiciled in occupied Norway. In accordance with section 4 of the Decree the Director of Shipping, as "Curator," exercises, to the exclusion of the right of the owner, the right of ownership in all assets outside the occupied areas belonging to owners of Norwegian ships and contracts for the construction of ships, etc., so far as concerns assets the owner has made use of in his shipping business and claims he has acquired in such business. As a result of these provisions the greater part of the Norwegian Merchant Navy, comprising about four million tons, has been brought under the control of the Norwegian Government and mobilized for the Allied war effort.

The legislation which has been effected during the Norwegian Government's sojourn in the United Kingdom falls into two clearly defined categories: (i) Provisions which have reference to the daily administration, civil and military, of State affairs over here, including the mobilization for the prosecution of the war of all the human and material resources at the Government's command, and (ii) Provisions which concern occupied Norway and which partly aim at counteracting the German exploitation, and partly purport to pave the way for punishing, with suitable severity, the traitorous crimes which have been committed during the occupation.

The general background for legal provisions of a military character which have been promulgated in the United Kingdom is formed by the Decree of December 13, 1940, relating to liability for military service and conscription of Norwegian nationals abroad. This Decree provides that all male Norwegian nationals residing abroad are, after conscription, liable to serve in the Norwegian armed forces from the year they attain the age of 18 until they attain the age of 55. Conscription is undertaken by a specific organization "Mannskaps—og Vernepliktsstyret" (the Conscription Board), which has authority to settle all questions relating to conscription. The decision as to what age groups shall be called up is made by the Government. In accordance with the provisions of Norwegian law (the Act of June 17, 1937, relating to the liability of objectors to military service to perform compulsory civilian work) the Decree provides that a person who has a conscientious objection against military service of any kind shall be exempted, on condition that he takes up the civilian employment allotted to him. It is likewise provided that a person who has a conscientious objection against serving as a combatant member of the forces shall be allowed to serve as a non-combatant.

Corresponding provisions concerning military service, conscription, etc., with regard to women are enacted by a Decree of July 24, 1942, relating to liability for military service of Norwegian women abroad. The military service age limits for women are from 18 to 40 years.

The Norwegian Military Penal Code of May 22, 1902, the Act of March 29,

900, relating to procedure in military criminal cases, and the Act of May 6, 1921, elating to military discipline and police authority have, in the main, proved ufficient in the situation which has arisen as a result of the establishment of a Norwegian military force in the United Kingdom. Several amendments have, owever, been necessary, partly owing to the fact that military forces are stationed utside Norway and partly for technical military and other reasons. The most mportant of the relevant amendments are :—

The Decree of July 3, 1940, amending the Act concerning judicial procedure n military criminal cases. This Decree includes provisions abolishing the appellate urisdiction in military criminal cases—the Military Supreme Court (Den Militære Höyesterett) and the Military Appeal and Complaint Division of the Supreme Court (Höyesteretts militære kjæremålsutvalg).

The Decree of November 15, 1940, supplements and amends the Military Penal Code and the Act relating to judicial procedure in military criminal cases. This Decree empowers the Norwegian Military authorities to hold a condemned person in custody after the sentence has been served, for as long as is found necessary, although not beyond the conclusion of a peace treaty nor longer than three years without reconsideration by the Court. It is stipulated that the person concerned must have been convicted of mutiny, conspiracy or the like, or that he has been guilty of several military crimes, and the Court has reason to suppose that he will again commit such crimes and that it is, therefore, of importance to the prosecution of the war that he is not allowed to go free.

The Norwegian Act of July 27, 1896, relating to military requisitioning in case of war is, with some few amendments, correspondingly applied to Norwegian nationals and Norwegian property abroad, by a Decree of September 13, 1940.

The greatest asset Free Norway possesses is the Norwegian Merchant Fleet, and it is by this means that Norway has rendered, and is rendering, her essential contribution to the fight against the common enemy. A natural consequence of this fact is that a very considerable proportion of the Norwegian Government's legislative work in the United Kingdom concerns shipping and aims at ensuring that the Norwegian efforts in this field shall be as effective as possible. As long ago as July 12, 1940, provisions were issued relating to the registration of Norwegian nationals and the introduction of conscription of labour, and these provisions were subsequently replaced by a Decree of December 12, 1941, on the same subject. The Decree clearly demonstrates that it was primarily drafted with the seamen in mind and aims at ensuring that every seaman who is fit for work shall, as soon as possible, be placed where he is most needed. It is provided that all Norwegian nationals over 16 years of age and residing outside Norway shall be bound to report for registration. Registration shall be effected by Registration Offices which are also Labour Exchanges and which shall ensure that Norwegian subjects not called up for military service go to sea or take up other civilian work as directed. Norwegians who fail to undertake or carry out work assigned to them by a Registration Office, or who carry out their work in an unsatisfactory manner, may be directed to take up and carry out such other employment or service for which they are deemed suitable. The same applies when the Norwegian authorities deem it necessary, in the interests of the war effort, that a person shall take over a position other than that which he holds, or shall remain in his present position. Directions as outlined above are given by the Conscription Board (*see above*). Any person who fails to enter upon, leaves, or in any other way fails in his duty to carry out the work or service to which he has been directed, is liable to a fine or imprisonment not exceeding six months. Any person guilty of an offence punishable under this Decree may be taken into custody by the Conscription Board and placed in a civil camp without conviction.

The Norwegian Government has availed itself of the authorization granted by the Allied Powers (Maritime Courts) Act, 1941, and enacted legislation whereby Norwegian Maritime Courts have been established in the Unfted Kingdom.

Provisions relating to these Courts and their procedure are given in a Decree of July 29, 1941. According to this Decree the Norwegian Maritime Courts of first instance in the United Kingdom are seated in London, Cardiff, Liverpool, Glasgow and Newcastle. A Maritime Court consists of one learned judge who acts as President; at hearings, two lay judges, who are appointed by the Ministry of Justice, participate. A decision reached by a Maritime Court, in so far as it concerns the application of the law, matters of procedure or apportionment of punishment, may be appealed against to the Appeal and Complaint Division (Anke- og Kjæremålsutvalget), which consists of three learned judges and is seated in London. A case where sentence has been pronounced by a Maritime Court may be re-tried by the Maritime Court of Appeal (Lagmannsretten for Sjöfartssaker). This Court is seated in London and consists of three learned judges and four lay judges. The Public Prosecution is represented in cases which are brought in pursuance of this Decree, by the Authorized Prosecutor and the Assistant Authorized Prosecutor and the Norwegian Consuls in the towns where the Maritime Courts of first instance are established. As far as the jurisdiction of the Courts is concerned, the Decree has reference to the Allied Powers (Maritime Courts) Act, 1941. With regard to procedure, there apply the usual regulations contained in the Norwegian Act of July 1, 1887, concerning procedure in criminal cases, and the Act of August 13, 1915, relating to Courts, with the exception of a few amendments concerning the serving of summonses, fixing of time limits, the duty of witnesses to attend, and so on, occasioned by the present exceptional circumstances.

In connection with the foregoing, mention should be made of the Decree of November 7, 1941, amending the Seamen's Act of February 16, 1923. With the object of improving the discipline on board vessels of the Merchant Fleet, this Decree has extended the right of Masters to impose disciplinary punishment. The right (in accordance with the Seamen's Act) to complain to the Courts (in Norway) regarding the imposition of disciplinary punishment has, under the circumstances, been replaced by the right to complain to the Maritime Courts in the United Kingdom.

Sickness relief for seamen of the Merchant Navy is the object of a Decree of November 28, 1941, relating to additions to the Health Insurance Act (Act of June 6, 1930). This Decree contains special regulations regarding health insurance for seamen serving on board Norwegian vessels outside Norway.

A Decree of January 3, 1941, aims at speeding up the recruiting of ships' officers in view of the urgent wartime need. Without regard to enactments concerning examinations, etc., which would ordinarily apply, it empowers the Ministry of Commerce to issue provisional master's, mate's or engineer's certificates according to the training and seafaring experience of the person concerned and his testimonials.

In accordance with section 75 K of the Norwegian Constitution and an Act of February 8, 1918, a special State audit is established in Norway, subordinate to the Storting. This organization audits the accounts of Government departments and other institutions and officials answerable to the State in financial matters. By virtue of a Decree of January 3, 1941, a State Audit Office has been established in London which, during the Government's sojourn outside Norway, shall carry out the auditing described above. This auditing is to be regarded as provisional as, after the Government's return to Norway, every account will be submitted to the State Audit for final examination.

According to the Norwegian Act of May 31, 1918, relating to the contraction and dissolution of marriages, divorce must be effected by a judicial decree, unless the consorts, by mutual agreement, leave the decision to the Ministry of Justice. Divorce by judicial decree cannot be effected in the United Kingdom in the absence of Norwegian civil jurisdiction, and consent to administrative handling of a divorce case is, in most cases, precluded owing to the severing of connections with Norway. To remedy this situation, it is provided by a Decree of April 15, 1942, that the

Ministry of Justice may make decisions in divorce cases if one of the consorts desires it and if, because of the war or other special conditions, it is impossible to serve notice on the other consort.

Of fundamental importance to the means of righting all the wrongs which have been committed in Norway during the occupation, is the Decree of July 29, 1941, relating to the re-opening and revision of judicial and administrative decisions made in Norway during the German occupation. This Decree stipulates that when Norway is liberated judicial decisions shall be liable to re-opening in the following instances:—

(*a*) If judges, jurymen or lay judges who have participated in the decision have been members of the Nasjonal Samling (Quisling's party); (*b*) if, on account of the war or the German occupation of Norway, a party has been prevented from appearing or from producing evidence and there is reason to believe that the decision has been affected thereby; (*c*) if enactments which have been made by the occupying Power in contravention of the Hague Convention of October 18, 1907, have been applied to the case, and there is reason to believe that the decision has been affected thereby; and (*d*) if there is reason to believe that the decision has been affected by the unconstitutional conditions relating to administration of justice created by the German occupation of Norway.

If an appeal has not been lodged because the judges of the superior Court were members of the Nasjonal Samling, when Norway is liberated the fixing of a new appeal time limit may be claimed.

According to the Decree, administrative decisions which have been made during the occupation within the territory occupied by the Germans may, in every case, be reconsidered and revised when Norway is liberated.

The Decree of October 3, 1941, relating to acquisition of rights in Norwegian companies has the object of preventing stocks and shares, etc., in Norwegian companies from being acquired by the Germans during the occupation, or in any other way falling into the hands of foreigners. This Decree stipulates that, without the consent of the Royal Norwegian Government, no rights in Norwegian companies may be acquired except by Norwegian subjects and by Norwegian corporate bodies, provided that the latter are administered by Norwegian subjects and that Norwegian subjects possess a predominant financial interest in them. Persons who have acquired Norwegian citizenship since April 9, 1940, are not considered Norwegian subjects for the purpose of this Decree. No person who, in pursuance of the provisions of this Decree, has to surrender his right in a Norwegian company can claim reimbursement of the amount paid.

Provisions relating to the intensification of the penal legislation with a view to dealing with traitors after the Government's return to Norway, are laid down in the following Decrees:—

The Decree of October 3, 1941, supplementing the Military Penal Code, includes provisions which lay down that, without regard to the prescriptions of section 14 of the Military Penal Code, the death penalty may be imposed and executed after the cessation of hostilities.[1]

The Decree of October 3, 1941, supplementing the Civil Penal Code includes provisions which lay down that in cases of crimes against chapters 8 and 9 (relating to treachery and the like) of the Penal Code, where a sentence of imprisonment for life can ordinarily be imposed, the death penalty may now be imposed.[2]

A further extension of the power to apply the death penalty to civil crimes is effected by a Decree of January 22, 1942. This Decree lays down that for crimes

[1] Section 14 of the Military Penal Code of May 22, 1902, stipulates that sentence of death may be pronounced in wartime only, and that a death penalty which has been imposed and not executed before the cessation of hostilities is to be replaced by imprisonment for life.

[2] The death penalty for civil crimes was abolished in Norway by the Penal Code of 1902. Death sentences had not been executed for a generation.

committed while Norway is at war the death penalty can be imposed when, for the actions in question, imprisonment for life can be imposed in accordance with the provisions of chapter 19 (relating to sexual crimes), chapter 21 (relating to unlawful imprisonment, abduction, etc.), and chapter 22 (relating to murder, manslaughter, assault and battery, etc.) of the Penal Code. The purpose of this Decree is to make possible the punishment, with suitable severity, of the Germans and Norwegian Nazis who have been guilty of the murder and ill-treatment of patriotic Norwegians in prisons and concentration camps. It is evident that in circumstances of this kind it is of no use employing the kind of punishment that is suited to conditions in a civilized community. If there should exist no means of applying the death penalty to the persons who are responsible for such crimes, the Norwegian people would assuredly regard this as a serious deficiency. The keystone of the legislation necessitated by these circumstances is represented by a Decree of January 22, 1942, supplementing the provisions of the Penal Code relating to treachery. It is here laid down that anyone who maintains, seeks or consents to membership of the Nasjonal Samling, the Nazi Hird or any other organization which aids and abets the enemy shall be punished with loss of public trust for life or for a fixed period of years. A fine of up to one million crowns may be imposed as an additional punishment. According to the Decree, loss of public trust entails loss of any public office which the guilty person may hold, loss of the right to vote in public affairs, loss of the right to serve in the armed forces of the State, loss of the right to carry on any trade, profession or business for which public authorization or approval is required, and loss of the right to hold any position, whether paid or unpaid, as head or high official in companies, friendly societies, financial institutions, associations or other organizations, and loss of the right to obtain appointment in one of the aforementioned positions or services. By virtue of a provision of this Decree the right to impose loss of public trust, etc. (a punitive measure hitherto unknown to Norwegian criminal legislation) is extended to also embrace crimes against the treachery provisions of the ordinary Civil Penal Code and against the articles of war of the Military Penal Code.

NOTES ON IMPERIAL CONSTITUTIONAL LAW.

[*Contributed by* PROFESSOR BERRIEDALE KEITH, D.C.L., LL.D.]

The Nationality of an Irishman.—In *Murray* v. *Parkes*[1] there fell to be decided the question of the nationality of an Irishman born in Eire, who had resided permanently in England since coming here in 1934. He intended at some future date to make a home in Eire, and he applied in October, 1941, for a permit to return there. The Lord Chief Justice pointed out that the contention for the plaintiff was that, by virtue of legislation of the Irish Free State passed in 1937 under the Statute of Westminster, Eire became separated from the British Commonwealth, and in particular from the United Kingdom. He pointed out that the Act of 1938 of the Imperial Parliament, which was alleged to confirm the secession, had no such effect, and the fact that he had a domicile of origin in Eire, and had never acquired a new domicile, was wholly irrelevant to the question of nationality as stated by Lord Westbury in *Udny* v. *Udny*[2]. Singleton, J. contended that no British subject could be deprived of his status merely by the Act of some Dominion elsewhere, and the decision in *Moore and others* v. *A. G. of the Irish Free State*[3] that the Legislature of one of the Dominions could now pass Acts repugnant to an Imperial Act was far from saying that they could alter the status of British subjects wherever they might be. Humphreys, J. accepted the views of the Lord Chief Justice. The matter, therefore, is definitely disposed of.

The Control by Foreign Governments in England of their Nationals.—*In re Amand*[4] there was decided the validity of the conscription by the Netherlands Government of Mr. Amand, a Netherlands subject living under the protection of the Crown in England, and that, while that Government had not ordinarily power to enforce that change of status by compelling its subject while resident in Great Britain to join the Netherlands forces, such a power was given to it by the Allied Forces Act, 1940, and the Order in Council under it which rendered

[1] 58 T.L.R. 231.
[2] (1869) L.R. 1 Sc. and Div. 441, at p. 457, *per* Lord Westbury.
[3] [1935] A.C. 484.
[4] 58 T.L.R. 187.

s. 154 of the Army Act applicable to him. Wrottesley, J. held that the decree of the Queen of the Netherlands of August 8, 1940, must be regarded as valid. It was contended that, without the authority of Parliament, no foreign Power could recruit an army in this country. But the British Government recognized Queen Wilhelmina and her Government as the Sovereign and Government of the Netherlands and as exclusively competent to perform the legislative, administrative, and other functions appertaining to the Sovereign and Government of the Netherlands. The decision to summon Dutch nationals was recognized by the Allied Forces Act, 1940, passed into law on August 22, 1940. The fact that the date of the Act was subsequent to the Royal Decree of the Queen of the Netherlands was academic, because the actual date involved was March 14, 1941, although he was most reluctant to suggest that the fact that the Sovereign and Government of our Ally should call to their aid Dutchmen resident here would be a breach of the Sovereign rights. He considered also the contention that the decree was not valid, as it exceeded the authority granted by the law of the Netherlands to the Government. He ruled against the contention that, where there was a decree of the Government admitted to be fully sovereign dealing with its own national, it was not for the court to listen to arguments impugning its validity as laid down in *Luther* v. *James Sagor*[5] and in *Princess Paley Olga* v. *Weisz*[6]. He did not think that these dicta were sufficient to cover the case before him, and he therefore reviewed the expert evidence given of the question and found the Royal Decree by Dutch law valid and effective. Croom-Johnson and Cassels, JJ. delivered concurring judgments.

The Exclusion of Appeal from the Judgment.—In *R.* v. *Secretary of State for Home Affairs, ex parte Amand*[7], an appeal was brought to the Court of Appeal by Mr. Amand from his condemnation by the Divisional Court. It was, however, held that the appeal related to a criminal cause or matter, and was accordingly incompetent under sec. 31 of the Supreme Court of Judicature (Consolidation) Act, 1925. The procedure demanded by sec. 154 of the Army Act required that a prisoner should be brought before a Court of summary jurisdiction, and that his case should be dealt with in like manner as if he were charged with an indictable offence. Thus there was the consideration of a crime, and a charge preferred before a Court exercising criminal jurisdiction, so the requirements as to its being a criminal cause or matter, laid down by the Lord Chancellor in *Clifford and O'Sullivan*[8] were amply fufilled. The decision of the Court of Appeal was upheld by the House of Lords on August 6.

Power of the Norwegian Government over its Subjects.—In *Lorentzen* v. *Lydden and Co., Ltd.*,[9] authority was given to the Order in Council of the Royal Norwegian Government dated May 18, 1940, authorizing the Curator appointed by that Government to collect claims belonging to shipowners and enforce them by action. It was claimed that by English Law the Order in Council could not operate to pass the ownership of any movable property or include any chose-in-action situated in England. Atkinson, J. went through the cases which had been decided earlier, including *In re Russian Bank for Foreign Trade*, but held that as Maugham, J. was there dealing with the effect of decrees which did not purport to have extra-territorial effect, he could not regard that as by implication laying down any guidance as to what the law was when dealing with the effect on a chose-in-action in England of a decree which in terms purported to deal, and deal only, with extra-territorial property. It did not appear to him, therefore, that there was any authority which prevented him giving effect to the decree. There had been quite lately on May 23, 1941, a decision of Shientag, J. affirmed by the apellate division of the New York Court in *Andersen* v. *N. V. Transandine Handelmaetschappij*. It was there held that the Royal decree of May 24, 1940, was a valid act of the State of the Netherlands, and had vested in the State title to the property which was claimed. Moreover, in *United States* v. *Belmont*,[10] the Soviet Government was permitted to assign to the United States Government a cash deposit with a New York institution, which stood in the name of a corporation which had been nationalized by the Soviet Government, though there was there involved an act of confiscation, as was freely recognized by the Court. In this case, however, he held that no confiscation was involved ; article V of the decree expressly provided that compensation for what was taken over by virtue of the present Order in Council should be fixed in accordance with Norwegian law. England and Norway were engaged together in a desperate war for their existence, and public policy certainly demanded that effect should be given to the decree. It was not confiscatory, it was in the interest of public policy, and it was in accordance with the comity of nations. Therefore he determined the issue in favour of the plaintiffs. He distinguished from it the case of *Banco de Viszcaya* v. *Don Alfonso de Borbon* v. *Austria*[11] on the ground that the legislation was penal in character. The Spanish Government declared the ex-King of Spain to be a traitor, and decreed that all his property should be seized for the benefit of the State. If the rule of law had been such as was contended for in this case, that it was a Spanish decree and could have no extra-territorial effect, it would have been wholly unnecessary to say any more, but that was not suggested by counsel, nor in the very careful judgment of Lawrence, J.

[5] [1921] 1 K.B. 456 ; 3 K.B. 532, at p. 548, *per* Warrington, L.J.
[6] [1929] 1 K.B. 718, at p. 725, *per* Scrutton, L.J.
[7] 58 T.L.R. 198. [8] [1921] 2 A.C. 570. [9] 58 T.L.R. 178. [10] 301 U.S. 324.
[11] [1935] 1 K.B. 140.

The Interpretation of a Contract for goods to be manufactured and to be delivered at a future date.—In *Fibrosa Spolka Akcyjna* v. *Fairbairn, Lawson, Combe, Barbour, Ltd.*,[12] the House of Lords has delivered a judgment overruling the decision in *Chandler* v. *Webster*[13]. The appellants, who were a Polish company carrying on business at Vilna, ordered on July 12, 1939, from the respondents, who were manufacturers carrying on business at Leeds, certain machinery which the respondents were to manufacture and deliver c.i.f. Gdynia at a future date. Part of the purchase price was to be paid in advance, and accordingly £1,000 was paid on July 18, 1939. The German invasion of Poland made impossible delivery of the goods. The Polish company, therefore, applied for the return of the sum paid by the respondents. In accordance with the decision in *Chandler* v. *Webster*, the Court of Appeal decided against the claim, and the appellants appealed to the House of Lords. A preliminary difficulty was got rid of by the appellants obtaining from the Board of Trade a licence to proceed with the appeal, notwithstanding that their clients might be in the position of alien enemies. The House of Lords had, therefore, to decide whether the amount paid in advance could be reclaimed. The Lord Chancellor pointed out that, if the contract were divisible in the sense that a sum is to be paid over in respect of completion of a defined portion of the work, it may well be that the sum is not returnable if completion of the whole work is frustrated. The cricket spectator who pays for admission to see a match could not recover the entrance money on the ground that rain had prevented play if, expressly or by proper implication, the bargain with him was that no money would be returned. But in the absence of any discussion between the parties, all that could be said was that the law must decide in the absence of such an agreement. In England it had been decided in *Chandler* v. *Webster*, and the question had been repeatedly acted upon in the Court of Appeal. Lord Dunedin in *Cantiare San Rocco* v. *Clyde Shipbuilding and Engineering Company*[14] had remarked on the difference between Scottish and English Law, while Lord Shaw denounced the doctrine which had been adopted in England. In the argument for the respondent the question was raised whether the House would be justified in disturbing a view of the law which had prevailed for nearly 40 years, which had been so frequently affirmed, and which at any rate furnished a simple rule against the effect of which the parties to a contract could, if they so desired, expressly provide. But the rule had been criticized,[15] and in the present case the Court of Appeal hinted a hope that this House might be able to substitute a more civilized rule. The *locus classicus* for the view which had hitherto prevailed was the pronouncement of the Master of the Rolls in *Chandler* v. *Webster*. But with all respect for his judgment, he held that his conclusion was unsound. Generally speaking, the money was paid to secure performance, and, if performance failed, the inducement which brought about the payment was not fulfilled. The result was that the rule in *Chandler* v. *Webster* was wrong and the appellants could recover their £1,000. While this result obviated the harshness, with which the previous view in some instances treated the party who had made a prepayment, it could not be regarded as dealing fairly between the parties in all cases, and must sometimes have a result of leaving the recipient who had to return the money at a grave disadvantage. But it must be for the legislature to decide whether provision should be made for an equitable apportionment of prepaid money which had to be returned by the recipient in view of the frustration of the contract in respect of which they were paid. Lord Atkin agreed with the view of the Lord Chancellor, and Lord Russell of Killowen took the same view, which was also held by Lords Macmillan, Wright, Roche and Porter.

Direct Taxation in Canada.—In *Atlantic Smokes Shops, Ltd.* v. *Conlon et al*[16] the question was raised as to the constitutionality of the Tobacco Tax Act, 1940, of New Brunswick. It provides that every consumer of tobacco purchased at a retail sale must pay at the time of purchase a tax in respect of the consumption. It also provides that every person residing or carrying on business in the province, who brings into it or receives delivery therein of tobacco for his own consumption, or for the consumption of other persons at his expense, or as agent for a principal, shall pay the same tax in respect of the consumption of such tobacco. The Chief Justice and Davies, J. held that in substance this was a tax on tobacco in respect of the commercial dealing between the retail vendor and the purchaser, and that the tax imposed on the importer was a tax in respect of the import of it for consumption. They held that the taxation could not be held to be a tax in respect of consumption, and therefore direct,[17] despite the declaration of the legislature, but that it fell under the definition of Customs and Excise duties and was therefore *ultra vires* the province. Rinfret and Crocket, JJ., on the contrary, held that the whole Act was within the constitutional powers of the province. Kerwin, J. held that, while the Act was valid in part, the provisions as to the liability of the importer, and those making the agent personally liable for the tax, were *ultra vires*. Hudson and Taschereau, JJ. agreed with Kerwin, J. so far as concerns the invalidity of the personal liability of an agent for the tax,[18] but otherwise held the Act as valid.

Necessity of Good Faith in Exercise of Delegated Powers.—By The Natural Products Marketing Act of British Columbia, a Board was established by the Lieutenant-Governor in

[12] 58 T.L.R. 308. [13] [1904] 1 K.B. 493. [14] [1924] A.C. 226.
[15] *E.g.* by Atkin,. LJ., in *Russkoe* v. *Stirk* (1922) 10 Ll. L. Rep., at p. 217.
[16] [1941] S.C. 670.
[17] *A.G. for British Columbia* v. *Kingcome Manufacturing Co., Ltd.* [1934] A.C. 45.
[18] See *Provincial Treasurer of Alberta* v. *Kerr*, [1933] A.C. 710.

Council to regulate the dairy business in a specified area in British Columbia. An order of the Board designated the Milk Clearing House, Ltd., as the sole agency to market the milk produced in that area. Milk producers were required to sell their milk to this agency, which disposed of it, partly in the fluid milk market, and partly in the lower-priced manufactured milk market, dividing the price obtained, less expenses, amongst the producers, irrespective of the mode in which each producer's milk was disposed of. The Chief Justice, Davies, and Hudson, JJ.[19]. held that the Board's action could not be sustained on the ground that it was under a strict duty to use its powers in good faith for the purposes for which they were given. They pointed out that the Board in effect was attempting to effect indirectly what the King in Council had adjudged they could not do lawfully directly, namely, by exacting monetary contributions from milk producers by a method constituting indirect taxation. The invalidity of such taxation had been established in the *Lower Mainland Dairy Products Sales Adjustment Committee* v. *Crystal Dairy, Ltd.*[20] The same view in effect was taken by the other members of the Court. While the judgment is no doubt correct, it reveals real difficulty in the Constitution, as it forbids the legislature to effect a result which may in itself be of value to the province.

The Rights of Transferred Officers.—In *Cogan and Others* v. *Minister for Finance*[21] the question arose of the effect of the Civil Service (Stabilization of Bonus) Regulations Order on the Civil Service (Transfer Officers) Compensation Act, 1929, which was passed to terminate the controversy between the British and the Irish Free State Governments regarding the rights of officers transferred to the Free State Government under Article 10 of the Constitution of the Irish Free State.[22] The regulations of 1940 stabilized the bonus of members of the Civil Service in general, and Gavin Duffy, J. held that the Minister for Finance had full statutory powers to take such action, and could not, even if he would, divest himself of these powers. This obviously could not be denied as regards civil servants generally, but it was argued that transferred officers were in a different position, and that under the Act of 1929 the stabilization order could not be made applicable to them. Gavin Duffy, J., however, pointed out that the language of sec. 14 (1) of the Act of 1929 clearly established that the salary conditions were to remain unchanged as before transfer. A cardinal condition of an officer under the British régime was his liability to have his salary varied at the pleasure of the British Treasury, and the Act of 1929, which was based on the Government of Ireland Act, 1920, sec. 55 (1), omitted the provision of that Act, which provided that the officers concerned should, while performing the same or analogous duties, receive not less salary than in their former service. The decision seems clearly sound.

The Validity of Commonwealth War Legislation.—The extent of the authority of the Commonwealth to make laws contrary to the ordinary law of the land in wartime has been declared in the most striking manner by a majority of the Australian High Court.[23] The subject matter at issue was the Commonwealth Government's Uniform Income Tax Legislation, against which a case was brought by the Governments of Victoria, South Australia, Queensland and Western Australia, which applied for a decree invalidating the Acts as *ultra vires* the Commonwealth Constitution. Sir John Latham, C.J. dissented from the majority ruling, and declared invalid the Act empowering the Commonwealth to take over for the duration of the war the accommodation and equipment of the State's taxation officers. He expressed the opinion that there was nothing in the Act imposing a uniform income tax which prevented the States exercising their taxing power. Apart from the defence power, it could hardly be argued that the Commonwealth could forcibly seize the State Income Tax Departments under a law specifically directed to that purpose, and a law so dealing with a State department was not within the Commonwealth's legislative power, and was therefore invalid. Starke, J. said that the maintenance of the States was as much an object of the Commonwealth Constitution as the maintenance of the Commonwealth; hence it was beyond the power of either to abolish or destroy the other. The stipulation in the Act authorizing grants to the States, in order that the States should vacate the income tax field, was unconstitutional, and the Act empowering the Commonwealth to take over the State Taxation Departments was also *ultra vires* defence or any other power conferred by the Commonwealth Constitution. On the other hand, Rich, J., with whom McTiernan and Williams, JJ. agreed, declared that the legislation was entirely valid. It was a genuine exercise of the defence power by Parliament. It was notoriously essential to the prosecution of the war, in which the continued existence, both of the Commonwealth and the States was at stake, that the entire resources of the nation should be marshalled and concentrated on the war effort. To wage war effectively, the Commonwealth must command the sinews of war, and income tax was an important source from which the funds required for war purposes might be drawn. The legislation showed that Parliament was determined to make unusually large drafts thereon. It must be confessed that the view taken by the majority of the Court is one which it is very difficult to accept as giving full effect to the provision of the Constitution.

[19] [1941] S.C. 573. [20] [1933] A.C. 168.
[21] [1941] T.R. 389.
[22] *Transferred Civil Servants (Ireland) Compensation Case* [1929] A.C. 42.
[23] *The Times*, July 24, 1942.

NOTES.

Review of Legislation.—The present volume, No. 24, will consist of only two parts, of which this is the second. The publication of the *Review of Legislation* has been postponed owing to the difficulties in the production of the *Review* covering the year 1940. It has been decided to issue one volume for the years 1940 and 1941, which will be published, unless further adverse conditions occur, as early as possible in 1943. This volume will present a survey of all the important legislation necessitated by the war throughout the Empire. It will be issued to all subscribers who have paid their subscriptions for the years 1942 and 1943. It will be appreciated that the volume will thus provide a valuable historical legislative record of the measures required to meet the assault upon the life of the peoples of the Empire.

Back Numbers.—Owing to the destruction of some of the Society's stock from enemy action, the Honorary Secretaries would be very glad to hear from any members of the Society who have copies to spare of Volume 22 (1940) Part 4, and Volume 23 (1941) Part 1. They are required for subscribers who wish to make up sets to retain permanently. Offers of earlier numbers are also welcome. The Honorary Secretaries take this opportunity to give public expression of their thanks to members who have rendered assistance in this way from time to time.

Lectures to Foreign Lawyers.—The High Commissioner for Australia, Mr. S. M. Bruce, President of the Society of Comparative Legislation, took the Chair at the first of a series of lectures in Lincoln's Inn Old Hall, arranged for foreign lawyers attached to the Allied Governments in London.

In introducing the lecturer, Sir Alison Russell, Mr. Bruce referred to the difficulty of the subject—" The Constitution of the British Commonwealth "—by mentioning that there had been a discussion among those upon the platform as to the meaning of the term " The British Commonwealth."

" There are two schools of thought," said Mr. Bruce. " One claims that the British Commonwealth embraces the self-governing Dominions and all the Colonies and Dependencies of the Crown. The other maintains that the British Commonwealth of Nations is composed of the United Kingdom and the Dominions, and if you want to include the Colonies and Dependencies as well, the proper term to use is the British Empire. I give this illustration to show how difficult the question is, and how almost impossible it is to make anyone understand. Personally, I have never been convinced that we understand it ourselves. It is of great importance that at least we should all get some idea of what we have been trying to achieve, because I feel that there are many lessons that can be learnt from what we have attempted to do in the British Commonwealth of Nations, or the British Empire.

" Perhaps what we have attempted and achieved may give an indication of the lines of closer association which may be developed amongst the nations of the world after the war."

Sir Alison Russell then read his lecture, which is printed in this issue (*supra* pp. 83).

At the conclusion, Professor Gerbrandy, Prime Minister of the Netherlands, moved a vote of thanks to Sir Alison Russell for his clear explanation of a subject which was of much interest to people abroad, and especially requested that such an admirable exposition should be printed in the *Journal*.

On the following Wednesday, when the second meeting was held, Lord Macmillan, who was presiding, opened the proceedings by saying : " We are to hear this afternoon Sir Cecil Carr discourse to us on the subject of which he is past master. His knowledge of ' British Legislative Methods ' is extremely wide, for he has been for many years the editor of the Revised Statutes and of the Statutory Rules and Orders, the latter being our form of delegated legislation.

" Sir Cecil recently delighted a large audience at Columbia University, when, on the Carpentier Foundation, he delivered six lectures on the same topic as he has chosen to-day. I commend the most attractive volume in which those lectures have since been published by the Oxford University Press, with the title ' Concerning English Administrative Law.' We shall, I know, listen to Sir Cecil with very great interest and attention."

Dr. Kaeckenbeeck, proposing the vote of thanks, said that the lecturer had explained his subject most lucidly, and given the audience much insight into the processes of the legislation used in England. He also thanked the Society of Comparative Legislation for the opportunity they had given the audience to gain some knowledge of the legal institutions of this country.

Unfortunately, Sir Cecil Carr's lecture is not available, but those interested in the subject can find much about it in the volume mentioned by Lord Macmillan.

The third lecture was a paper[1] written by Mr. C. E. A. Bedwell on " The Inns of Court," which was read for him by Professor Gutteridge, as he was unable to be present owing to a serious optical operation.

Sir Cecil Hurst, who was in the Chair, referred to the fact that Mr. Bedwell had just completed twenty-five years as Honorary Secretary of the Society, and asked that great attention should be paid to this reading, as so many people seemed not quite clear what service the Inns of Court rendered in the national life, especially those from the Continent, where there was no similar institution. He hoped that this lecture would induce the audience to study the legal institutions of England.

[1] The substance of this paper is to be published as an article on "The International Influence of the Inns of Court" in the *Contemporary Review* for January, 1943.

Mr. Bedwell referred in particular to the occasions in the sixteenth and seventeenth centuries, when distinguished foreigners were admitted *honoris causa*, generally on the occasion of the Reader's Feasts, to the Inns of Court.

General de Baer, President of the Belgian Maritime Court, moved the vote of thanks to the reader, and said how interesting the paper had proved to be. That the law was so flexible, and not a dead letter, appealed to him especially, as it was more marked in this country than in any other he had visited.

The fourth and last lecture was on the "Courts of Law," by Mr. Richard O'Sullivan, K.C., who gave a most illuminating account of how justice is administered in this country.

At the conclusion of the lecture, Lord Atkin, who presided, said that he was very glad to be at the last of the series which he felt sure had been useful. "Although there may be different systems of law, we are all doing the same thing—administering justice according to law. Unless we do in that sense perform our duties, the subject has a very small chance of justice, for the decision will rest upon the whim of the judge or upon the whim of the Government of the time. In this country, however much the law may be criticized, that law has been administered in a way which has not been swayed by the will of the Government of the day. That is what I am sure we all look forward to when the tortured countries have been restored to their former liberties. Apart from that I do not think it matters much what the various codes of law enact. They change and yet remain the same thing. For instance, we administer in the Privy Council five different jurisprudences. But right through there is very little difference when you come to consider what ought to be done in particular circumstances as between man and man. Most cases depend on question of fact. It is not often there is a real controversy on questions of law." Lord Atkin said that in his experience as a judge, eighty per cent. of the cases tried themselves, if the judge would only sit still and hold his tongue. It was important that judges should listen, and that they should have the right attitude to the people who come before them.

Lord Atkin also mentioned the right of access to the Courts. All men should feel that they have the liberty to come to the Court if they have been deprived of their rights. It is true that people are quite helpless unless they have legal assistance, and in all our courts facilities are available from solicitors and counsel who give their services.

Lord Atkin thought that we shall all be more anxious when peace comes to make our systems of law conform. It has been suggested that there should be formed an Institute of Legal Research, which will enquire into the working of the law systems of different countries and help to secure that unity which we all feel really underlies the administration of justice wherever found. He expressed the hope that when happier days come again some of those present would help in the work of such an Institute. That would be the crowning result of the step which we have taken in arranging these meetings.

The expenses of the Lectures were defrayed by a grant kindly made by the Pilgrim Trustees.

Comparative Criminal Law at Cambridge.—The functions of a University in providing education for students and in prosecuting research have in England not been fully performed in that branch of learning which is concerned with the study of crime. It is true that the subject of Criminal Law has long been taught in our Universities; but research in this subject has not been adequately promoted, for, strange to say, not one of these universities has yet established a Professorship of Criminal Law. But even this would not be enough, for it is now realized that criminal law is only a part of a much greater subject, namely, criminal science. Any attempt to prosecute research into problems of criminal law which does not take this fact into account, and is therefore not conditioned by it, will not be fully successful, and as education in any subject must have a background of research on comparative lines, therefore the teaching of criminal law will also suffer. Criminal science does not merely deal with criminal law: it is also concerned with investigations into the origins of crime, the personality of the delinquent, the kinds of treatment to be accorded to the delinquent, and the machinery of justice, all of which are questions of the highest importance and, in the words of Mr. Justice Frankfurter, need to be "subjected to that systematic, disciplined, continuous attack of reason which we call scientific procedure." These subjects cannot properly be studied by confining attention to the system of one country alone, for the results of the investigations should be made available to the legislator and to those who have to administer criminal justice in all countries and they should likewise be made available to the teachers of criminal law, for a student of criminal law at a University may be expected ultimately to take part in the administration of criminal justice.

The late Professor C. S. Kenny realized the importance, in teaching, of placing criminal law in its correct relation to these other branches of criminal science. It may thus be regarded as fitting that the Faculty of Law in which Kenny worked should continue to promote research in the wider field of that science.

It was in this spirit that in August, 1940, the Faculty Board of Law in the University of Cambridge decided to set up a special body to deal with the subject. Accordingly the Board appointed Professor P. H. Winfield (Chairman), Dr. L. Radzinowicz, Dr. R. M. Jackson and Mr. J. W. C. Turner (Secretary) to be a committee to consider the promotion of research and teaching in criminal science.

That such action as was thus taken by the Faculty was regarded as a movement towards the satisfaction of a need is apparent from the welcome which the new committee received.

Legal periodicals, institutions and individuals, concerned with the promotion of the social, medical and legal sciences, expressed their appreciation of the importance of the step which had been taken and their readiness to co-operate with the committee. Recognition of the practical value of such work as the committee envisaged in the sphere of criminal administration was at once given by certain Government departments.

The success with which the work of this committee met soon led the University to create a permanent Department of Criminal Science, in the Faculty of Law, and in this the committee has now been merged, the management of the Department having been entrusted to the four members of the original committee with the addition of Dr. Ellis Lewis (the Squire Law Librarian) and of the Emeritus Professor of Comparative Law.

The Department have adopted a plan of work initiated by the committee on the following lines :—

(*a*) The preparation of publications mainly intended to promote the further study of different aspects of criminal science.
(*b*) The collation of the conclusions of expert investigators in special topics, to provide material for the solution of outstanding problems.
(*c*) The prosecution of research, not only by members of the Department, but also by others under the auspices of the Department.
(*d*) The publication from time to time of treatises on special matters of topical importance.
(*e*) The organization of comparative studies.

Under (*a*) a volume entitled *Penal Reform in England* has already been published. Under (*b*) a volume on the subject of Mental Variations and Criminal Behaviour is now being prepared by fourteen British medical authorities, collaborating in a unified plan prepared by the Department. Under (*c*) the Department themselves are engaged on a survey of all the reports of the Royal and Departmental Commission and Parliamentary Papers which have been issued on the administration of justice, criminal law and procedure, and the treatment of offenders. This involves investigations into the Blue Books over a period of the past 250 years. The result of these investigations will be published in the form of a survey of these Reports, and a complete catalogue of them. This will be the first compilation of this kind ever published here and is intended to provide not only a book of reference, but also a source for further research It is hoped that it will be useful not only in the study of the history of criminal law in this country, but will be of assistance to those who will be charged in the future with the administration of justice and the promotion of penal legislation here and elsewhere.

There are some subjects of topical importance in criminal science in which immediate interest can be stimulated by concise treatment in an easily accessible form. The Department therefore are promoting the publication of a pamphlet series in parallel with the series of books. The Canadian Bar Association have most generously offered to collaborate in this enterprise by undertaking to publish these shorter studies in the *Canadian Bar Review*, and to reproduce them subsequently as pamphlets. The first of these, dealing with the controversy as to whether a conviction should or should not be recorded against an offender who is put on probation has already appeared. This consists of four short sections each by a different author (including Professor E. Sutherland, who writes on the position in the U.S.A.), preceded by a general survey written by the editors. Pamphlets now under preparation will deal with aspects of punishment, penal development in India, the organization of the after-care of discharged prisoners in England, and some other subjects.

In the sphere of comparative studies (*e*), the first subject which has been undertaken is a survey of the development of criminal justice and its administration in the principal countries of Europe in the period 1920–1939. It has been decided that this shall take the form of a double contribution in each case, consisting (i) of a general study on the system of each country and (ii) of answers to a questionnaire. This questionnaire has been prepared by the Department and contains 47 questions.

This survey will comprise the essentials of the systems of each of the countries, presented in parallel form, so as to provide what it is anticipated will be regarded as a work of reference for all students of criminal science, and for the departments of state concerned with the administration of criminal justice in all its aspects.

The Department's plan has been most courteously received by the Embassies and Legations of the different countries, who have very kindly lent their assistance in enabling the Department to get into touch with the jurists whom they wished to invite. As the result, leading authorities of more than ten countries have undertaken collaboration with the Department in this scheme.

In this connection the Department in November, 1941, organized a Conference, and representatives of nine allied countries met in Cambridge to discuss the Survey, and also the general possibilities of international collaboration in the investigation of penal questions. One of the resolutions unanimously adopted by the Conference was on a motion proposed by the Minister of Justice of Luxembourg, Monsieur Victor Bodson, in the following terms :—

> " That this Conference welcomes the Cambridge Department's action in initiating the Survey, and reaffirms the undertaking of its members to assist in its speedy completion. Furthermore, as scientific investigation is the basis of effective international collaboration on penal matters this Conference expresses the hope that the Cambridge Department will continue in the future its comparative studies, and assures the Department of the interest of the Allied Governments in this work."

The interest and sympathy which this movement in furtherance of comparative study in criminal science has evoked augurs well for the future. If the present spirit and energy in international co-operation be maintained, noteworthy successes will be achieved.

H. C. G.

Social Security in New Zealand.—In Mr. Maurice Stack's article on *Social Security*, Volume 23, page 129, reference was made to the arrangements for financing the new benefits added in 1938. This was effected by the special national tax of 8d. in the pound on all incomes being increased to one shilling, and not two shillings as mentioned in the article.

Legality of Detention under Defence Regulations.—In *Rex* v. *Secretary of State for Home Affairs*, ex parte *Budd*, [2] the Court of Appeal was asked to reverse the decision of a Divisional Court refusing, by a majority, his application for a writ of *habeas corpus*. The Court of Appeal pointed out that *Liversidge* v. *Anderson* [3] and *Greene* v. *Secretary of State for Home Affairs*, [4] both decided by the House of Lords, had decided the substantial issue involved, namely, whether it was open to any Court to enquire into the reasonableness of the belief of the Secretary of State in the matters in which the regulation required him to have reasonable cause to believe before a detention order could be made. The majority of the House of Lords had clearly held that, if the Home Secretary gave evidence to the effect that, in his opinion, there was reasonable grounds for his belief, his statement, being merely a statement as to his opinion, must necessarily be accepted, unless it could be shown that he was not acting in good faith, and the onus of showing this would lie upon the appellant. In this case these rulings precluded investigation of the reasonableness of the cause of the belief stated by the Secretary of State. This ruled out the argument that had been adduced that the Home Secretary had no reasonable cause for being satisfied that the British Union of Fascists was an organisation of the character described in the regulation 18B(1A). The second argument was based on section 3 of the Habeas Corpus Act, 1816, which permitted the Court to examine into the truth of the facts set forth in a return to a writ of *habeas corpus*, although the return might be good and sufficient in law. But it was pointed out that the decision in *Greene* v. *Secretary of State for Home Affairs* [4] precluded any interpretation of the circumstances of the case as regards whether the Home Secretary had or had not reasonable cause for believing any of the matters in which he had stated he had a reasonable cause for belief. The third argument rested on the defective authority for his previous arrest. That had been severely criticised by the Divisional Court and need not be further commented on. The Home Secretary had in fact made a regular order for his detention, and there was no ground for the argument that a person who had been released from custody on a writ of *habeas corpus* could not be subjected to a second detention for the same cause. The decision in the first case was not based on the ground that the real order made by the Home Secretary was one which he had no power in law to make, but on the ground that the terms of that order had not been communicated to the appellant in such a way as to enable him to make representation to the Home Secretary.

A. B. K.

Comparison of English and South African Law.—Professor G. Wille has revised for publication in the *South African Law Journal* (May, 1942) an informing lecture delivered at the University of Cape Town, in which he compared English with South African Law. He finds that they are very similar, and, broadly speaking, he adds, "we have adopted what are undoubtedly the best portions of the British Law, but have retained our common law, the Roman-Dutch law, whenever there was a conflict between the two."

Professor Wille surveyed the various branches of law with a view to pointing out differences firstly of importance, and secondly of interest. The administration of justice, including the law of procedure under the two systems, is very much alike, if not identical. The making and interpretation of law is analogous. In addition, South Africa has the treatises compiled by the jurists in Holland in the sixteenth, seventeenth and eighteenth centuries as a reservoir of knowledge upon which to draw for the decisions of points still awaiting elucidation. It is claimed accordingly that there is greater elasticity in the Roman-Dutch law, and that it compares favourably with the English law, "which has, in the course of time, become very rigid and conservative."

The practice in the courts is similar, and so is the position and status of the practitioner, with one curious difference. "While in South Africa the academic education of an advocate is much higher than that of an attorney, in England," in the view of Professor Wille, "the reverse is the case."

The law of evidence is an instance of the adoption of a very large and very practical branch of the law of England almost *in toto*.

In criminal law there is no great difference. South Africa has adopted most of the list of English crimes, together with their definitions, but has retained several offences known to the Roman-Dutch law, such as *crimen læsæ majestatis* and *criminal injuria*, and has formulated others to regulate peculiar conditions in South Africa, such as illicit

[2] 58 T.L.R. 212. [3] 58 T.L.R. 35. [4] 58 T.L.R. 63.

intercourse between European and Native. There is one striking difference in procedure in criminal cases. The Crown counsel has no right of reply, whether evidence has been called for the accused or not. The speech of the defending advocate is the final impression upon the minds of the jury, as a rule incapable of appreciating the discrepancies which might have been pointed out on behalf of the Crown. The Judge may do his best to see that justice is done, but he cannot act as counsel, with the result that the scales are weighted heavily in favour of the accused, and, adds the Professor, " many undoubted miscarriages of justice have occurred in the past."

Turning to the civil law, contracts received the first attention, and in that branch variations are largely matters of terminology. Two points, however, deserve to be noted. The provisions of the Statute of Frauds requiring them to be in writing are not in operation in the Union, except in Natal. The other point of difference is the one familiar through controversy whether consideration in the English sense was necessary to render a contract actionable. In the various kinds of contracts there is a great degree of similarity between the two systems, especially in the realm of commercial law, owing to the close business relations between England and South Africa.

Thus South Africa is an example of the influence of the business community upon the uniformity of law. In such subjects as partnership and agency the English authorities are quoted as a matter of course and generally relied upon in the South African Courts. The Professor recognises that the influence of the English law has had a " beneficent " effect.

In the law of libel and defamation there are curious similarities and dissimilarities, and in both Professor Wille finds a lack of principle, leading him to the conclusion that in both countries the law is " extremely unsatisfactory."

The law of property presents the utmost divergence in the two systems, " not only as regards the various interests in property which are recognised by the law, but also as regards the methods of creating and transferring these interests."

In the law of persons, though necessarily there must be a general similarity, there are important differences " in the acquisition and in the loss of some of the various capacities." It is considered that the law relating to the legal capacity of married women is out of date, and should be amended so as to correspond with English law.

Professor Wille is led to the general conclusion that " the law of England is more technical and conservative than ours, which is simpler and more elastic. There is more scope for our courts, which have made many improvements in the course of the last few generations ; other changes which they had no power to make they have suggested to the legislature, which has generally effected the required reforms."

Refusal of Minister to Order Production of Documents.—In *Duncan and another* v *Cammell, Laird and Co., Ltd.*,[5] the House of Lords cleared up most of the difficulties which have been raised on the subject of the right to discovery of documents. It is laid down that where the Crown is a party to a suit discovery of documents cannot be demanded from it as a right, though in practice, for reasons of fairness and in the interest of justice, all proper disclosure and production would be made. In civil proceedings in England where a *subpoena* is issued to a Minister to produce a document (not necessarily in a suit where the Crown is not a party), or where he intervenes in a suit between private individuals to secure, on the ground of public interest, that documents in the hands of one of the litigants should not be produced, the principle to be applied by the Court is that documents otherwise relevant and liable to be produced must not be produced if the public interest requires that they should be withheld. The test may be found to be satisfied either by having regard to the contents of the particular documents, or by the fact that the documents belong to a class which, on grounds of publication, must as a class be withheld from production. The documents which were applied for in this case were documents which had been investigated by the First Lord of the Admiralty, and which referred to matters concerned with the case of the submarine Thetis. He swore an affidavit to the effect that it was contrary to the public interest to reveal these documents, and the Lord Chancellor called attention to the fact that Lord Eldon in 1822 had given a decision on the point in *Earl and others, Commissioners of the Board of Customs for Scotland* v. *David Vass*.[6] Vass claimed that the Commissioners of Customs should produce certain documents relating to his conduct, and the Court of Session had upheld his right. On appeal Lord Eldon ruled that the interlocutors complained of should be reversed. In many cases decided by inferior Courts the same principle had been observed. What was clear was that the Minister should take exception himself to the revelation of the documents. The remaining question was whether, when objection had been duly taken, the judge should treat it as conclusive. In certain cases the opinion had been expressed that the judge might properly probe the objection by himself examining the documents, as had been done by Scrutton, J., in *Asiatic Petroleum Company* v. *Anglo-Persian Oil Company*,[7] and Macnaughton, J., had acted similarly in *Spigelmann* v. *Hocker*.[8] On the other hand, it had been held in *Beatson* v. *Skene*,[9] and in *Lords Commissioners of the Admiralty* v. *Aberdeen Steam Trawling and Fishing Company, Ltd.*,[10] that the view of the Government

[5] 58 T.L.R.242. [6] (1818) 1 Shaw 62. [7] [1916] 1 K.B. 822. [8] (1933) 50 T.L.R. 87
[9] 5 H. & N. ,at p. 853. [10] [1909] S.C. 335.

Department was final. Moreover, there was a further reason why the Court should not ask to see the documents, for, where the Crown was a party to litigation, this would amount to communicating with one party to the exclusion of the other. The Lord Chancellor expressly differed from the rule laid down in *Robinson* v. *State of South Australia* (No. 2),[11] in which the Judicial Committee reversed the decision of the Supreme Court, which had refused to order the inspection of documents, which the Minister in charge of the department objected to produce, on grounds of public policy, and remitted the case to the Supreme Court, with the direction that it was one proper for the exercise of the Court's power of inspecting documents, in order to determine whether their production would be prejudicial to the public welfare. Their Lordships' judgment was partly based on their interpretation of a rule of Court, which was in the same terms as Order 31, Rule 19A, Sub-Rule 2 of Rules of the English Supreme Court. This Rule provides: "Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege." In his opinion, the Privy Council was mistaken in regarding such a rule as having any application to the subject matter. The withholding of documents, on the ground that their publication would be contrary to the public interest, was not properly to be regarded as a branch of the law of privilege connected with discovery. Privilege in relation to discovery was for the protection of the litigant, and could be waived by him; but the judge should insist, if necessary even though no objection were taken, on the protection of documents which it would be contrary to the public interest to reveal. The decision was that undoubtedly of the judge, but the ruling of the judge should admit as decisive the view of the executive authority. A. B. K.

Refusal to Allow an Alien to Land.—In ex parte *Lannoy*[12] a Belgian subject was on the high seas removed from a Portuguese ship by British Naval Authority, and against his will conveyed to a British port. On his arrival there the immigration officer informed him that he had been refused leave to land, and would be removed from the ship in custody. He at no time desired or asked leave to land, and, while he was detained under Article 3 (4) of the Aliens Order, 1920, he began an application for a writ of *habeas corpus*, but before the case was heard the Home Secretary made an order under Article 5A of the Order of 1920, which was admitted to make the alien's continued detention legal. It was held by Humphreys and Singleton, JJ., that the alien's detention under Article 3 (4) on arrival in England was valid as leave to land had been refused by the Immigration Officer within the meaning of the Article and that accordingly the alien was not entitled to his costs of the application for the writ of *habeas corpus*. Lord Caldecote dissented from this judgment on the ground that leave to land could only be refused to someone who had asked for leave, or was attempting to land without leave, or whom it was proposed to put on shore without his consent. A. B. K.

Uniformity of Legislation.—The Report of the Canadian Bar Association for 1941 contains an admirable account of the work of the Commissioners on Uniformity of Legislation, which is worthy of attention at the present time, as it suggests possibilities of an analogous body Imperial in its scope. Its foundation was due to the appreciation by the Canadian Bar Association of the benefits resulting from the work of the State Commissioners in the United States. Some Provinces appointed Commissioners by Statute, while others sent representatives without legislative appointment to attend a conference convened on September 2nd, 1918. Since 1935 representatives of the Dominion Government have taken part in the work of the Conference. The table of model statutes prepared and adopted by the Conference shows the extent to which they have been accepted by the Parliament of Canada and the Legislature of the Provinces and provides a tribute to the effectiveness of the work of the Commissioners. At the last meeting, of which a full report is printed, drafts of the following were presented and approved: Interpretation Act, Evidence Act, Libel Act, Warehouse Receipts Act and Married Women's Property Act. The Evidence Act was presented by the Dominion representative, and is mainly a revision of enactments existing in the various Provinces and that of the Dominion, though it contains certain matters not found in any of them.

> "Provision has been made," the report continues, "for presenting to the Court, by its leave, a written report or finding of facts prepared by an expert not being a party to the cause or an employee of a party after notice thereof has been given to the opposite party and subject to the right of the opposite party to cross-examine the expert who made the report and other persons who furnish the information to the expert. It is thought that these new provisions may effect a saving of time and be of some assistance in cases where scientific and other complicated problems are involved."
>
> "Provisions were also made in the new draft Evidence Act for the admission of business records under certain circumstances. There has also been included in the Act provisions similar to the English Evidence Act, 1938, whereby signed statements are made admissible in evidence if the maker of the statement cannot be produced at the trial."

[11] [1931] A.C. 704. [12] 58 T.L.R. 207.

" The Conference also considered and recommended for adoption provisions whereby a print from any photographic film, of bank books or records or bills of exchange, etc., which have been destroyed, lost or delivered to a customer, may be received in evidence. This also includes records, documents, books or papers belonging to or deposited with Departments of the Government of Canada. Provision was also made for proving the death of a person who was a member of His Majesty's Forces by means of a certificate signed by certain officials of the Department of Militia in charge of records or by certain officers of His Majesty's Naval, Military or Air Forces." The text of the Act is printed in full with annotations.

Among the reports and memoranda attached to the record of the proceedings is one on a proposal to print a consolidation of all uniform acts. It was obviously desirable to have them all in one volume with such amendments as had been found necessary. It was recognised, however, that the present time is not opportune and that its publication must await the cessation of hostilities.

The interest of the commercial community in the work of the Commissioners is exemplified in a letter from the Canadian Manufacturers Association on the subject of an amendment of the Uniform Sale of Goods Act. The Bills of Sale Act and that Act show that it is possible for uniform enactments to be adopted by the legislatures of all the English-speaking communities.

Polish Lawyers Association in the United Kingdom.—The Association was founded in August, 1940. Its objects are:—1, collaboration in all works aiming at a Polish and Allied victory; 2, collaboration with Polish Authorities in the solution of juridical problems; 3, bringing together all Polish jurists who migrated from Poland and preserving them for Poland; 4, promoting study of law among Polish youths; 5, study of the British nation, country and legal institutions; 6, propagating among the British society information on Polish law and legal institutions; 7, mutual moral and material assistance.

The membership is over 250. The Association organises lectures on English and Polish law and legal institutions, delivered by English and Polish prominent jurists. Many of these lectures are printed and sent to members residing outside London. The Association, with the collaboration of the Polish Government, has organized legal studies by correspondence, for students and for persons having a degree in law, to enable the former to continue and accomplish their university course and to prepare the latter to posts in central and local administration and in jurisdiction. All the subjects are taught by university professors.

The Association is in touch with similar Polish organizations in the U.S.A., in Brazil and in Palestine.

Among others, Professor H. C. Gutteridge has addressed the Association and dealt with " the English Approach to Juridical Problems." By explaining the main differences existing between the English and continental ways of constructing law and resolving juridical problems, Professor Gutteridge paved the ground for better mutual understanding between Polish and English jurists.

Statute Revision in America.—*The Tulane Law Review*, which devotes itself not only to the civil law, but also to comparative law, codification and statutory interpretation, opened its issue of February, 1942 (Vol. XVI, No. 2) with a noteworthy article on " Statute Revision, its Nature, Purpose and Method." The authors, Mr. J. Franklin Wheeler and Mr. Thomas B. Wheeler, are experts both in theory and practice; they have to their credit much good work in the revision of the laws of Kentucky. The progressive State of Wisconsin has been a pioneer in this field as in so many other activities of social significance. As early as 1858 it appointed commissioners to " collect, compile and digest the general laws of the state " for publication. An Act of 1898 invited the commissioners to " correct such errors and harmonize such discrepancies in the statutes as they shall deem advisable, together with such additional sections as they think proper to carry out the general design and purpose of the statutes." The revisers were authorized to amend punctuation and errors in spelling and to insert sub-heads. Their report was to show the need and advantage of the various sections and to indicate every proposed change, verbal or otherwise, so that the legislators could readily detect the scope of the modifications. Other States made similar efforts. Commissioners were appointed sometimes by the legislature, sometimes by the governor, and sometimes by the supreme court. The authors of the article indentify for us three types of revision in the different States. A " New York type " has sometimes gone as far as to alter public policy and, in such fields as criminal law, school law and taxation, has been controversial enough to influence the results of elections. A " Wisconsin type " respects substantive rights and basic State policy, but simplifies the procedure of law enforcement. A " Kentucky type," familiar to our two authors in their own labours, undertakes to give effect to a newly-adopted State constitution as well as to make the laws conform to present social and economic conditions. It alters the statute-book sporadically, but does not seek to change public policy in matters of controversy. The influence of the State constitution is a phenomenon which English readers, accustomed to a flexible unwritten constitution and a supreme Parliament, naturally find strange. The authors cite, for instance, a Kentucky enactment that the confidential relations and communications between physician and patient shall be the same as those provided by law between attorney and client. This, they say,

is not valid law, since it is not covered by the title as required by s. 51 of the Kentucky constitution. In Britain the task of statute law revision is first to comb out from the statute book all words or enactments which are obsolete or otherwise inoperative, secondly to frame a Bill whereby Parliament will formally declare this dead matter to be repealed, and thirdly, when the Statute Law Revision Bill for this purpose has been passed, to produce volumes of revised statutes omitting what has been repealed. In Kentucky the revisers re-write and clarify the law, achieving what in Britain is done by consolidation and amendment; they have to omit laws which the courts have declared invalid on constitutional grounds and also laws which they themselves find it necessary to eliminate " because they were not covered by the title of the Acts from which they were taken, because the Act had no enacting clause or no title, or because the Bill was not signed by the Lieutenant-Governor." Conversely, they must reinsert provisions, not found in the compiled version of the State laws, because the governor, in dealing with the repealing Bills, had not stated his reasons and the repeals were therefore invalid. We may find the legislative procedure difficult to understand, but we can appreciate the revisers' responsibility.

The authors wisely warn readers against expecting the legislature to produce a statute book which realizes the ideal of Benthamite nomography, something orderly, concise and easily intelligible. Legislators in Kentucky, where they devote only part of every other year to law-making, are busy folk interested primarily in measures of immediate practical purpose and perhaps especially of local scope. Their duty is to respond to the wishes of the public; the public makes no articulate demand for tidy laws. But in Kentucky, it seems, there need be no timidity about those minor changes of statutory meaning which are an inevitable preliminary (with us, all too often, an insurmountable obstacle) to the tidying process. " Sensitiveness of the public and the legislature " to these small changes in the law, say the authors in a footnote, " has been much over-emphasized."

The statutes of the States of America display the same quaint survival as those elsewhere. The 1936 edition of the Kentucky Statutes until recently contained 67 sections on the subject of turnpikes, though no toll road has existed in the State for thirty years. An unrevised Wisconsin enactment still forbids horses to be hitched to the iron fence round the State Capitol, though both iron fence and horses have disappeared from the Capitol square. Yet these picturesque anachronisms are not the largest class of obsolete provisions. " For every legal archaism that finds its way into the Sunday magazine, dozens of sections equally obsolete, and therefore equally unnecessary, clutter up the statute book." That is a truth with which any student of the British Statutes, especially if he ranges over such topics as summary jurisdiction, must respectfully agree. C. T. C.

Legislative Procedure in South Africa.—In the *South African Law Journal* for February, 1942 (Vol. LIX, Part I) Mr. Ralph Kilpin's study of " The Making of Laws " gives a well-drawn outline of public bill procedure in the Union Parliament. South Africa bases its practice on that of Westminster, in which Mr. Kilpin was well grounded. English readers will note with interest the few minor differences which have somehow been developed. He draws attention to one constitutional feature deserving perhaps of special mention. The Governor-General, when a Bill is presented to him for the King's assent, may, in the King's name, either give or withhold assent, or may return the Bill to the House in which it originated with any amendments he may recommend. Standing Orders 166, 171 and 198 facilitate the correction of errors before a Bill reaches the Governor-General. After it has reached him, he does not in practice withhold assent; but the power to return Bills has been occasionally exercised with advantage to correct mistakes not noticed before the Bill was transmitted for his assent or to make alterations found necessary after a Bill has passed both Houses. Mr. Kilpin cites as instances the Precious Stones Bill in 1899, the Public Service and Pensions Bill in 1923, the Drought Distress Relief Bill in 1927, and the Customs Tariff Bill in 1931-2. C. T. C.

NOTICES OF BOOKS

LAW WITHOUT FORCE.

In the book *Law Without Force*,[1] by elaborate theorizing and the use of long words and novel phrases, the author brings himself in the end to a conclusion which seems curiously inconsistent with the lessons of observation and common sense.

He traces the history of the development of international law, and pictures the community of nations since the time of Grotius as a collection of independent national States which are the sole repositories of physical power and are by nature addicted entirely to self-regarding purposes, in whose pursuit they have in the past been restrained to a limited extent by rules of international law. He regards these rules as having been derived from general principles of morality applicable to the relations between individual persons, and as having depended for such power as they possessed mainly, in earlier times, upon influences such as religion, and, in more recent times, upon the pressure of trading and other individual interests having important international relationships and associations.

He thinks that the modern development of society, with its increase of State power and

[1] *Law Without Force.* By Gerhart Niemeyer. (Princeton University Press, London: Humphrey Milford.) p. xiv, 408. 22s. 6d.

extension of State ownership of property and State control over the activities of individuals and the consequent weakening of individual responsibility, has made it impossible for the commands of international law, as heretofore existing, to exercise any longer a sufficient control over the power and self-will of national States, and that a new system of international law is therefore needed to realize a legal order in international politics. This view seems little open to criticism, but the same cannot be said of the ideas which he then proceeds to propound, that "functionalism" affords a key to the problems of the social life of individuals and nations, and that the solution of the problem of international order is to be found in the development of a functional conception of legal rules.

"The functional notion of law," he says, "discarding the idea that legal rules are commands, finds law to be the element of orderliness which is inherent in the actual behaviour of individuals." The application of this to international law appears to require, in his view, that statesmen should somehow come to recognize and follow such rules of State-conduct as are necessary to co-ordinate the mutual activities of States so that they can best attain their functional ends. The new international law is not to be created, but is to follow from the inner necessity of orientation of the minds and impulses of statesmen towards the functional ends of the State in its international relationships. The idea of an international statute law is lightly dismissed on the supposition that the constitution of an international legislative authority on an effective basis is a practical impossibility.

A person of common sense who looks out upon the real world of to-day, and particularly upon the recent activities of Germany, Italy and Japan, and the character of their leading statesmen, will not take readily to the idea that an element of orderliness is inherent in the actual behaviour of States, and will surely be little tempted to trust merely to the hope of a new orientation of the minds and impulses of statesmen as the foundation for future world order. He is more likely to see the absolute necessity for all peace-loving nations to band themselves together in an organized association which will control the anti-social proclivities of individual States by the enforcement of definite laws backed by the united authority and power of the supporting nations.

As Mr. Robert H. Jackson, Associate Justice of the Supreme Court of the United States, well said in a recent and admirable address to the American Bar Association (published as No. 374 in the "International Conciliation" series of the Carnegie Endowment for International Peace), "the world is in war to-day, chiefly because its civilization had not been so organized as to impress the 'bad man' with the advisability of keeping the peace," and "the conquest of lawlessness and violence among the nations is a challenge to modern legal and political organizing genius." The address ends with these words, "We, as lawyers, hold fast to the ideal of an international order existing under law and equipped with instrumentalities able and willing to maintain its supremacy and we renew our dedication to the task of pushing back the frontiers of anarchy and of maintaining justice under the law among men and nations." There seems more hope for the world in the ideas thus proclaimed than in the idea of the development of a functional conception of legal rules.

F. N. KEEN.

THE LAW OF TRIAL BY NEWSPAPER.[2]

THE author of this excellent study in comparative jurisprudence has graciously presented a copy of the second edition to the Society "to recall England's finest hour." Our first duty is accordingly to make acknowledgment of such an act of generous and delicate courtesy, and to observe that the principles of freedom which the people of England defended when they stood practically alone in that great hour are principles which they share (and which they now defend in common) with the people of the United States, and which are enshrined in a common legal tradition and inheritance.

The fact is illustrated on the front page of this work by a distinguished American lawyer who takes for his text a principle which was stated by Lord Russell of Killowen in *R.* v. *Gray* [1900] 2 Q.B. 36, and was cited with approval in *R.* v. *Editor of the New Statesman* (44 T.L.R. 301): "The Liberty of the Press is no greater and no less than the liberty of every subject of the Queen."[3]

The argument of the book is that Trial by Newspaper "has destroyed the constitutional guarantee of a fair and impartial hearing in the United States and particularly in Massachusetts." The purpose of the author is to recall the Judiciary to a sense of its duty and interest to vindicate the majesty of the law and protect its great constitutional guarantee.

The book is divided into three parts. The first part contains a manifestly careful survey of American, and the second of English, adjudications. The third part consists of a critique and a synthesis and contains a useful comparison of the functioning and the development of the Law of contempt by publication in England and America.

With the statements that are made concerning the facts and the law touching what is called Trial by Newspaper in the United States, the reviewer is not competent of his own knowledge to deal, and the condition of the Temple and of the law libraries in war-time does not invite research. Though the author writes with vigour, as, for instance, when he says

[2] *Contempts by Publication: The Law of Trial by Newspaper.* By Harold W. Sullivan. (2nd ed.) (Privately printed in Boston, Mass., U.S.A.)

[3] And see *Ambard* v. *A. G.* [1936] A.C. 322, 337, where it is said that the Liberty of the Press is "no more than the liberty of any member of the public to criticize temperately and fairly, but freely, any episode in the administration of justice."

(at p. 131) that " the offence of trial by newspaper is as common and obvious as the rising and the setting of the sun," yet on a careful and even a critical reading, one is impressed with the substance of what he has to say and left with a sense of the reality of the problem that he tackles with so much public spirit. Take this passage, for instance: "There are only two adjudicated cases of contempt by publication in the State (of Massachusetts) reaching its supreme Judicial Court in 136 years of reports[4] . . . . It is difficult to recall in the last twenty years a single instance where a Court has taken steps, under its contempt powers in Massachusetts, to cite publications that constituted trial by newspaper, although every capital trial is disgraced by journalistic performances that spread confessions, identifications, comparison of handwriting and past criminal records over its pages long in advance of trials . . . In the capital trial of Sacco and Vanzetti (1922) newspaper stories undoubtedly influenced the result . . . In the capital case of Jessie Costello (1933) both district Attorney and defence Counsel vied with each other in trying the case in the press long in advance of trial . . . In the case of Newell Sherman (1935) the police furnished the Press, and almost every paper smeared over its front pages a full and complete confession in advance of trial."

In this state of things, the author thinks that it is the duty of every judge, as the first official act of his day's work, to scan all papers published in the county in which he is holding Court, in order to ascertain if the Press has published anything that tends to affect the determination of cases, civil or criminal *on file* or on trial in his court; and in such case to issue a rule and proceed with the same celerity as if it were a contempt that scandalised the Court. " In England, citing for contempts that scandalize the Court is obsolete. On the other hand, the English Courts cite swiftly and relentlessly for contempts by publication that constitute trial by newspaper."

It is scarcely accurate to say that citing for contempts that scandalize the Court is obsolete in England. The *dictum* to that effect in *McLeod* v. *St. Aubyn* [1899] A.C. 549,561 was rejected the following year (*R.* v. *Gray* [1900] 2 Q.B. 36) in a judgment which was cited with approval by the Privy Council in the *New Statesman case* (*ubi sup.*) and *Ambard* v. *Attorney-General for Trinidad* [1936] A.C. at pp. 322, 335. Nor do English Courts proceed *of their own motion* for contempts by publication that constitute trial by newspaper. Nor, we think, does the author really intend it, for he speaks elsewhere of " a craze and struggle between contending attorneys (in England) to succeed in obtaining an adjudication for even technical contempts, if only to obtain the imposition of costs." The picture is perhaps a little overdrawn, but in any event it is a salutary reflection. On every view we remain heavily in debt to the author for a thoughtful and interesting essay in research and for the delightful dedication of his gracious gift.

R. O'S.

POLISH COMMERCIAL LAW: POLISH SCIENCE AND LEARNING.

Polish Commercial Law[5] contains a very able and interesting article by Professor Helczynski on the " Underlying Principles of Polish Commercial Law." In July, 1934, a new Commercial Code came into force in Poland as the result of the labours of the Codification Commission set up in 1919. Prior to 1934 four distinct systems of commercial law were applied in the four constituent territories of Poland: The French Code de Commerce in so-called Congress Poland; the German Commercial Code of 1861 in Southern Poland; the revised German Commercial Code of 1897 in Western Poland; and the Russian Commercial Code in the North-Eastern territory. The main object of the new code has been to abolish discrepancies between these four legal systems, but the opportunity has also been utilised for the purpose of bringing Polish Commercial Law up to date, of leaving the way open for future development. The code includes some new features, one of which is of particular interest to English lawyers. Mercantile Custom has hitherto not been regarded on the Continent as a source of law, but merely as an element of implied agreement between parties to commercial contracts. This was the result of an attitude of mind which regarded a code as all-embracing and all-sufficient —a theory which still finds support, though it has been deprived of a certain amount of its rigidity by the force of circumstances. Professor Helczynski calls attention to Article 1 of the Polish Commercial Code, which provides that, in commercial matters, either the rules of the code or of customary law are to be applied and resort is only to be had to the ordinary civil law when neither of these sources is available. This fundamental rule which—as Professor Helczynski observes—was only arrived at after prolonged discussion—represents a distinct and important deviation from current legal tradition on the Continent.

H. C. GUTTERIDGE.

THE ANNUAL REGISTER, 1941.

IN spite of all adversities, which have been numerous for the publishers, *The Annual Register*[6] appears in the usual form, and its contents are as comprehensive and accurate as when it was produced under normal conditions. In the Legal Section, Regulation 18B receives due attention, and it is noted that the year provided the third appeal against a conviction of murder since the institution of the Court of Criminal Appeal. The Section

[4] Elsewhere (p. 125) we are told that there are 500 reported cases on Contempt in the English Courts during the last two centuries.

[5] *Polish Commercial Law. Polish Science and Learning.* (Oxford University Press, June, 1942.)

of Public Documents includes the secret German documents seized during the raid on Lofoten Islands, embodying instructions to the Army on the control of the Press on the collaboration of the Gestapo on dealing with Norwegian Nationals.

The following publications have also been received:[7]

Approaches to Social Security. An International Survey. (London: P. S. King and Staples, Ltd.) Pp. 100. 2s.

Bihar and Orissa: *Local Statutory Rules and Orders,* 1917. Supplement: Vol. II. (Patna, Government Printer.) 1942. Pp. 202. 21s.

Brazil: *Third Meeting of Ministers of Foreign Affairs of the American Republics.* Five vols. Ministério Das Relações Exteriores. (Rio de Janeiro.) 1942.

Canadian Bar Association: *Proceedings of the Twenty-fifth Annual Meeting,* 1941. (Toronto: National Printers.) Pp. 366.

Carter, Henry F. *Cancioneiro Da Ajuda.* (Pennsylvania: Lancaster Press Inc.) Pp. xvii, 190. 15s. 6d.

Craig, Alec. *Above All Liberties.* (London: Allen and Unwin.) Pp. 205. 7s. 6d.

Crowe, S. E. *The Berlin West African Conferences,* 1884-1885. Royal Empire Society. Imperial Studies, No. 19. (London: Longmans, Green and Co., Ltd.) 18s.

Czechoslovak Year Book of International Law. (London: Sweet and Maxwell.) Pp. vi., 236. 8s. 6d.

De Felice, Theodore. *Gouvernements nationaux et Accords internationaux.* (Geneve: Libraire de l'Universite.) Pp. 168.

Diplomatic Correspondence of the United States. Vol. II., 1821-1835. (Columbia University Press, Carnegie Endowment for International Peace, Washington.) Pp. xxxviii., 1,016. $5.00.

Gooch, G. P. *Studies in Diplomacy and Statescraft.* (London: Longmans, Green and Co., Ltd.) Pp. vi., 373. 12s. 6d.

Jackson, Mabel V. *European Powers and South-East Africa.* Royal Empire Society. Imperial Studies, No. 8. (London: Longmans, Green and Co., Ltd.) Pp. vi., 284. 21s.

Justo, Alberto M. *Perspectivas de un Programa de derecho Comparado.* Florida: Pp. 63.

Kaeckenbeeck, Georges. *The International Experiment of Upper Silesia.* (London: Oxford University Press.) Pp. xxxix., 867. 42s.

La Plata University: Anales de la Facultad de Ciencias y Sociales. Tomo XII., Part ii. 1941. Edited by Enrique V. Galli. Pp. 760.

Miller, Margaret. *Labour in the U.S.S.R.* (London: British Association for Labour Legislation.) Pp. 49. 9d.

Napoleão Aluizio. *Santos Dumont E A Conquista Do Ar.* Ministério Das Relações Exteriores. Pp. 270. (Imprensa Nacional. Rio de Janeiro.) 1941.

Neuendorff, Gwen. *Studies in the Evolution of Dominion Status.* (London: Allen and Unwin, Ltd.) Pp. vi., 379. 18s.

Pink, Gerhard P. *The Conference of Ambassadors.* (Paris: 1920-1931.) Geneva Studies. Vol. XII., Nos. 4-5. February, 1942. (Switzerland.) Pp. 293. 80 cents.

Riesenfeld, Stefan A. *Protection of Coastal Fisheries under International Law.* (Columbia University Press, Carnegie Endowment for International Peace, Washington.) Pp. xii., 296. $2.00.

Laws of Trinidad and Tobago. 1940. Six vols., prepared by Justin Louis Devaux, K.C., and Elliot Francis Maingot. (London: C. F. Roworth, Ltd.)

United States. State Law Index. Library of Congress Legislative Reference Service. (Washington: Government Printer.) Pp. vii., 706.

Weinfeld, Abraham. *Towards a United States of Europe.* American Council on Public Affairs. (Washington.) Pp. 52. $1.

Whiteman, Harold Bartlett. *Neutrality,* 1941. Yale University Undergraduate Prize Essay. (London: Humphrey Milford.) Pp. iv., 71. 6s.

Ziegler, Benjamin Munn. *The International Law of John Marshall.* (North Carolina University Press.) Pp. vii., 386. $3.50.

The following periodicals have also been received: American Bar Association Journal; American Journal of International Law; American Political Science Review; Australian Law Journal; Bombay Law Journal; Bombay Law Reporter; Calcutta Weekly Notes; Canadian Bar Review; Chinese Social and Political Science Review; Colombia Law Review; Eugenics Review; Hindustan Review; International Labour Office Bulletin; International Labour Review; International Review of Agriculture; Journal of the Parliaments of the Empire; Judicial Review; Law Quarterly Review; Madras Law Journal; Medico-Legal Review; Modern Law Review; New York University Law Quarterly Review; Revue Internationale de la Croix Rouge; South African Law Journal; Toronto University Law Review; Tulane Law Review; Wisconsin Law Review.

[7] Mention here does not preclude review later.

THE JOURNAL OF COMPARATIVE LEGISLATION AND INTERNATIONAL LAW

THIRD SERIES—Vol. XXIII, Part I.

Six Shillings. February 1941.